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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

LOCAL 783, BRIDGE STRUCTURAL AND
ORNAMENTAL IRON WORKERS,

Petitioner,

vs.

BE&K CONSTRUCTION, CO.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Matthew R. Robbins
PREVIANT, GOLDBERG, UELMEN, GRATZ,
MILLER & BRUEGGEMAN
1555 N. Rivercenter Drive, Suite 202
P.O. Box 12993
Milwaukee, WI 53212
(414) 271-4500

Attorney for Petitioner,
Local 783, Bridge Structural and Ornamental
Iron Workers

40 pp

QUESTION PRESENTED

May a union be held responsible for the misconduct of individual union members solely because a union officer arranged for an attorney and posted bail for them at time when there had been no judicial determination of illegal activity by the individuals?

PARTIES TO THE PROCEEDING

The name of the only party to the proceeding in the Court of Appeals for the Eighth Circuit which is not listed in the caption of the case in this Court is:

The National Labor Relations Board[1]

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[1]Petitioner Ironworkers Local No. 783 was the Intervenor in the Court of Appeals.

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LOCAL 783, BRIDGE STRUCTURAL AND ORNAMENTAL IRONWORKERS,

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vs.

BE&K CONSTRUCTION, CO.,

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Local 783, Bridge Structural and Ornamental Ironworkers, prays that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on May 12, 1994.

REPORTS OF OPINIONS BELOW

The opinion of the Court of Appeals delivered below is reported as BE&K Construction, Co. v. National Labor Relations Board, 23 F.3d 1459 (8th Cir. 1994). The opinion of the Court is attached herein as Appendix A. The decision of the National Labor Relations Board and its Administrative Law Judge is reported as Ironworkers Local No. 783, 311 NLRB 734. The decision of the Board affirming its Administrative Law Judge is attached hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was dated May 12, 1994. An Amended Judgment was entered on August 3, 1994. On August 9, 1994, the Court entered an Order extending the time for filing a petition for Writ of Certiorari to Sunday, September 11, 1994. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 8(b) of the National Labor Relations Act, 29 U.S.C. §158(b), provides in relevant part:

> It shall be an unfair labor practice for a labor organization or its agents -
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in §157 of this title ....

STATEMENT OF THE CASE

1. Introduction

Ironworkers Local No. 783 (the "Union") represented Ironworkers on construction sites in the upper peninsula of Michigan. On September 9, 1989, a violent demonstration occurred on a construction site at International Falls, Minnesota, outside the jurisdiction of the Union. A number of Union members participated in this demonstration along with members of other unions and unidentified persons.

After the demonstration seven individual members of the Union were arrested. None was an officer or representative of the

Union. After being contacted by friends and family of the arrested Union members, Union business representative John LaVallee obtained a personal loan. He used money from this loan to post bail for the arrested individuals. He also arranged for legal representation for the arrested individuals.

Ultimately, Four of the seven individual members plead guilty to criminal charges of riot. Three of the seven arrested members were subsequently released.

After BE&K Construction filed an unfair labor practice charge with the National Labor Relations Board, a Complaint issued. The Complaint in essence alleged that the Union had violated §8(b)(1)(A) of the National Labor Relations Act by participating in the violent demonstration at International Falls, Minnesota.

2. The Decision of the NLRB Administrative Law Judge

The trial of the case centered upon the conduct of business representative LaVallee. The Administrative Law Judge ("ALJ") credited the testimony of LaVallee. He rejected the fundamental allegation of the Complaint: the ALJ concluded that LaVallee had not participated in, organized or authorized the demonstration or the misconduct of individual union members. He also held that LaVallee's acts of assistance after the riot and the Union's failure to discipline its members did not constitute condonation so as to make the Union liable for the individual member's misconduct.

3. The Decision of the National Labor Relations Board

The National Labor Relations Board (members Stevens, Devaney and Oviatt) adopted the recommended Order of the Administrative Law Judge and dismissed the Complaint. The Board found without merit the contention of BE&K that LaVallee by arranging legal representation and posting bail for arrested union members had ratified their misconduct. The Board stated:

Four members of the Respondent did ultimately plead guilty in early 1990 to criminal charges of riot. But at the time LaVallee posted bail for them and for others who also were arrested, no judicial determination had yet been made that any of them had engaged in any unlawful acts, and they were thus still presumptively innocent of any wrongdoing. Indeed, three of the seven members of the Respondent who were arrested were subsequently released.

Under these circumstances, we find LaVallee's personal activities on behalf of members of the Respondent was not condonation or ratification by the Respondent of the alleged misconduct for which the members had been arrested. Rather, LaVallee merely assisted certain of the Respondent's members to exercise a legal and constitutional right. Accordingly, the Judge properly refused to hold the Respondent liable for the misconduct under principles of condonation and ratification.

4. The Decision of the Court of Appeals

The Court of Appeals did not reverse the Board's finding that the Union had not engaged in unlawful conduct up to and including the day of the violent demonstration. The Court of Appeals held that the Board erred in failing to find that the Union, after the demonstration, ratified, condoned and adopted its members actions. The Court of Appeals relied upon LaVallee's action in obtaining bail and an legal representation for the arrested members combined with the failure of the Union to explicitly disavow their misconduct.

5. Basis of Jurisdiction In Court of Appeals

The basis for jurisdiction in the Court of Appeals is §10(e) of the National Labor Relations Act, 29 U.S.C. §160(e).

REASONS FOR GRANTING THE WRIT

For more than seventy years the Court has rejected the theory that unions are vicariously liable for the acts of union members. The Court has held that the law does not create an affirmative obligation upon a union to discipline its members or take other affirmative action to disassociate itself from them. Rather, a union is only liable for acts of individual members where the Union by its conduct has established an agency relationship with the members engaged in misconduct.

The decision of the Court of Appeals, reversing the National Labor Relations Board's decision, is contrary to these long established principles.

In United Mine Workers v. Coronado Coal. Co., 259 U.S. 344 (1921), the national union neither disavowed the acts of local members nor took any disciplinary action when they engaged in a violent attack upon a coal mine. The Court held that this did not create an agency relationship. Therefore, the national union was not liable for the acts of local members. Id. at 393-396.

In United Mine Workers v. Gibbs, 383 U.S. 715 (1966), the Court again addressed the responsibility of a union for violent acts by its members. The Court again held that a union need not affirmatively disavow unlawful acts or face liability. The Court stated:

> There can be no rigid requirement that a Union affirmatively disavow such unlawful acts as may previously have occurred. Cf. ILWGU v. Labor

> Board, 237 F.2d 545. What is required is proof, either that the Union approved the violence which occurred, or that it participated actively or by knowing tolerance in further acts which were in themselves actionable under State Law or intentionally drew upon the previous violence for their force.

Id. at 739.

In Carbon Fuel Co. v. United Mine Workers, 444 U.S. 212 (1979), the Court considered the liability of a national union under a collective bargaining agreement, for strikes in violation of that agreement by local union members. Notwithstanding the contractual relationship, the Court held that ordinary agency principles applied. The Court held that absent a contractual requirement, the national union was under no obligation to engage in any affirmative acts to end the strike or disavow the conduct of the local members. Rather, applying the common law agency test, the Court held that there must be legal proof of agency. No liability could arise unless it is shown that the Union supported, instigated, ratified or encouraged the unlawful activity. Id. at 215.

In the instant case, the evidence of Union involvement prior to the violent demonstration was conflicting and circumstantial. There was no direct evidence of participation by any representative of the Union, including business representative LaVallee. The Board credited the testimony of LaVallee that he did not participate in or authorize the demonstration. Because there was substantial evidence to support the Board's factual findings, the Court of Appeals was required to accept them. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). In fact the Court of Appeals declined to find any error in the Board's determination that the Union's conduct up to and including the morning of the demonstration did not establish an agency relationship with the members who engaged in misconduct. BE&K Construction Co. v. NLRB, 23 F.3d 1459, 1465 (8th Cir. 1994). Rather, the Court of Appeals relied upon the conduct of

the Union subsequent to the riot. This consisted of two things: (1) the failure of the Union to disavow the acts of the local members; and (2) Business Representative LaVallee's payment of money to provide bail and legal representation to arrested local union members.

However, since Coronado Coal Co., it has been settled that an agency relationship is not created merely because a Union fails to disavow the unlawful acts of its members. Therefore, the Court of Appeals decision rests upon the fact that a Union representative from personal funds provided bail for arrested Union members and arranged for them to have an attorney.

The decision of the Court of Appeals presents a direct conflict with the legal principle adopted by the Board in this case. The Board held that an agency relationship is not created merely by a Union officer providing bail to arrested Union members and helping them obtain legal representation. The Board noted that at the time the members had been subject to no judicial determination of guilt but rather were clothed with a presumption of innocence. The Court of Appeals in contrast would imply ratification of unlawful acts merely because a Union official provided bail to the arrested Union members prior to their trial or entry of a plea.

This conflict between the Board and the Court of Appeals is an issue involving national labor policy. It is an issue that arises again and again in the course of labor disputes.

Moreover, nothing in the law of agency supports the Court of Appeals holding.

Ratification requires either:

(a) A manifestation of an election by one on whose account an authorized act has been done, to treat the act as authorized; or

(b) Conduct by him justifiable only if there was such

an election.

Restatement (Second) of Agency §83.

Under this standard, one individual does not ratify another individual's conduct because he helps another individual obtain legal representation or bail. Assisting someone in asserting their legal rights does not ratify any criminal conduct nor create an agency relationship.[2]

CONCLUSION

The Court of Appeals and the Board are in conflict on a basic legal issue: Does a Union official's payment of money to obtain bail for arrested union members constitute ratification of any misconduct a member engaged in. It has arisen and will continue to arise in the course of labor disputes.

Moreover, the Court of Appeals opinion departs from this Court's prior holdings that a Union's failure to disavow unlawful acts by its members does not create an agency relationship. The Court should resolve the issue of when a union may be held responsible, under the National Labor Relations Act, for conduct of individual union members.

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[2]This is particularly true where, as here, three of the seven arrested union members were later released.

Therefore, the Court should grant the Petition for Writ of Certiorari.

Respectfully Submitted,

MATTHEW R. ROBBINS
PREVIANT, GOLDBERG, UELMEN,
GRATZ, MILLER & BRUEGGEMAN, S.C.

Counsel for Petitioner, Local 783,
Bridge Structural & Ornamental
Iron Workers.

APPENDIX

BEST AVAILABLE COPY

United States Court of Appeals

For the Eighth Circuit

No. 93-2637

BE&K Construction Company,

Petitioner,

v.

National Labor Relations Board,

Respondent.

Submitted: January 10, 1994

Filed: May 12, 1994

Before BEAM and MORRIS S. ARNOLD, Circuit Judges, and WELLFORD*, Senior Circuit Judge.

WELLFORD, Senior Circuit Judge.

*The Honorable Harry W. Wellford, Senior Circuit Judge, United States Court of Appeals for the Sixth Circuit, sitting by

designation.

We review the action of the National Labor Relations Board ("NLRB") in this case following a very serious disturbance, described by the Administrative Law Judge ("ALJ") as the full-scale "riot," involving certain union members at a massive construction project of the petitioner, BE&K Construction Company ("BE&K"), at International Falls, near the conjuncture of the borders of Minnesota, Michigan and Canada. Several unions were involved in the mass picketing and demonstrations at the BE&K construction site which preceded the September 9, 1989 riot. The ALJ described a series of walkouts and "disruptive picketing activity at the jobsite, as well as "menacing" and "intimidating" conduct of construction trade unions which occurred over a number of weeks prior to the riot which resulted in property damage of over $2,000,000 and serious personal injury to a number of persons trying to protect the property destroyed.

Following this episode, BE&K filed an unfair labor practice charge against Ironworkers Local Union 783 ("the local") in Marquette, Michigan, for threatening, coercing and restraining its employees by (1) trespassing and disrupting operations; (2) physical assault and battery; (3) destruction of property; and (4) arson. The General Counsel for NLRB (Eighteenth Region) filed a complaint thereafter against the local (or "respondent") for engaging in unfair labor practices by restraining and coercing "employees in the exercise of heir rights guaranteed" under the NLRA and by "participating in a riot at BE&K's camp housing compound ... by burning it to the ground, and by otherwise threatening employees and destroying property." An ALJ heard the charges and rendered a decision on April 29, 1992 in case No. 18-CB-2021. After an analysis of the facts, the contentions of the parties, the briefs, and "factual highlights of the case," the ALJ exonerated the local of responsibility for the undisputed violent and malevolent conduct displayed in the happenings at BE&K's property, including numerous criminal offenses against BE&K, its employees, the police, and others. Petitioner excepted to the conclusion that the local "did not engage in unfair labor practices

as alleged." Essentially, BE&K maintained before the Board that: the local was responsible for its members' participation and hat it was actively involved in the riot; the local condoned and ratified its members' illegal actions; the ALJ committed clear evidentiary errors or oversights; the ALJ erroneously refused to consider "principles of mass action;" and the ALJ failed to attach significant weight to the actions of the local's principal official, John LaValle.

The Board affirmed the ALJ's decision despite its professed abhorrence of "the rioting, violence, physical attacks and property damage that occurred." The Board, in its one page decision and order (Case No. 18-CB-2021) (311 NLRB #73), footnoted the following findings of the ALJ:

> [M]ost of the passengers on the chartered bus from Iron Mountain, Michigan, to International Falls, Minnesota, on September 8-9, 1989 were members of the Respondent, and (2) that the passengers on the bus were drawn primarily from the Respondent's membership. But the record does not actually reveal the names or organizational affiliations of the passengers who were on the bus to International Falls. The record does, however, reveal the names and union affiliations of the passengers who were on the bus as it began its *return trip from* International Falls later in the day on September 9. There were 32 passengers on the bus then, 11 of whom were members of the Respondent.
>
> . . .
>
> [T]he judge stated that bus owner Donald Dabb testified that Respondent Business Manager John LaVallee telephoned him in late summer 1989 to ask about chartering a bus for a trip to "Minnesota." Dabb's testimony at the hearing,

> however, which was consistent in this regard with his testimony in an earlier deposition that is in evidence, was that LaVallee asked about a trip to "Minneapolis."
>
> . . .
>
> [T]he judge stated that Ralph Guentzel was a member of the Respondent. The record establishes that Guentzel was a member of Iron Workers Local 563, but not that he was also a member of the Respondent. From the context of his fn. 3, it appears that the judge meant to refer to Robert Grenschow, a member of the Respondent who was convicted of riot, but who was not on the bus when it began its return trip from International Falls on September 9, 1989.

311 NLRB #73.

The Board also noted that its "established policy is not to overrule an [ALJ's] credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect." The Board discovered "no basis for reversing his findings." The Board also responded negatively to BE&K's exception about LaVallee's personal arrangement for legal representation and posting bail for local members who were arrested at the scene "in conjunction with the riot."

> Four members of the Respondent [local] did ultimately plead guilty early in 1990 to criminal charges or riot. But at the time LaVallee posted bail for them and for others who also were arrested, no judicial determination had yet been made that any of the presumptively innocent of any wrongdoing. Indeed, three of the seven members of the Respondent who were arrested were subsequently released.

311 NLRB #73.

The Board concluded, therefore, that the local had no ability based upon LaVallee's "personal activities" noted above, which "was not condonation or ratification" by the local of the "alleged misconduct for which the members had been arrested."[1] (emphasis added). LaVallee's conduct, the Board asserted, was simply assisting members "to exercise a legal and constitutional right." 311 NLRB #73.

We have carefully considered the record in this case and all the briefs, including the local's brief as intervenor. We begin by referring to the statutory words of the charge made against the local: "It shall be an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of the rights guaranteed in section 7 [29 U.S.C. §157] of this article. 29 U.S.C. §158(b)(1)(A).

Included among the rights of employees protected under 29 U.S.C. §157 are "the right . . . to form, join or assist labor organizations . . . [and] the right to refrain from any or all of such activities . . . ." The right to refrain from joining or assisting a union is an equally protected right with that of joining or forming a union. Local 57, Int'l Ladies' Garment Workers v. NLRB, 374 F.2d 295 (D.C. Cir.) cert. denied, 387 U.S. 942 (1967); Dannen Grain and Milling Co. v. NLRB, 130 F.2d 321, 328 (8th Cir. 1942); Blanchard v. Johnson, 388 F. Supp. 208, 215 (N.D. Ohio 1974); rev'd on other grounds, 532 F.2d 1074 (6th Cir.), cert. denied, 429 U.S. 834 (1976); NLRB v. Granite Stated Joint Board, Textile Workers Union of America, Local 1029, 409 U.S. 213, 216 (1972) (§7 gives an employee the right to refuse to undertake and involve himself in union activities). The Supreme Court quoted a co-sponsor's statement of purpose with regard to

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[1]LaVallee obtained a personal loan which he used for these activities [which was] . . . repaid 2 months later through contributions" of local members and others. 31 NLRB #73 n.3.

this section in NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 187-188 (1967), noting it is "designated to protect employees in their freedom to decide whether or not they desire to join labor organizations, to prevent them from being restrained or coerced." The NLRA, thus, proscribes coercive, violent and threatening conduct by either an employer or a labor organization.

The policy of the act, as it addresses wrongful and unfair conduct by a union, is set out in 29 U.S.C. §151:

> Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes or other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce.

We must decide whether there is substantial evidence in this record to support the Board's factual determinations. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). See also WCCO Radio, Inc. v. NLRB, 844 F.2d 511, 514 (8th Cir.), cert. denied, 488 U.S. 824 (1988). The Board, however, made few independent factual findings in this case. For the most part, the Board simply adopted the ALJ's "rulings, findings and conclusions." We, therefore, assess the ALJ's decision carefully together with the entire record, mindful that our examination "requires more than a parsing of the record for evidence supporting the Board's decision. We must also consider evidence in the record that fairly detracts from the weight of the decision." Schnuck Markets, Inc. v. NLRB, 961 F.2d 700, 704 (8th Cir. 1992).

The underlying activity in this controversy extended over a 400 mile crescent-shaped area extending from Wisconsin through Michigan and into northern Minnesota. According to the ALJ,

seemingly uncontradicted evidence showed that "unionized construction trades," including ironworkers unions, expressed over many months prior to September 9, 1989, "animosity" and "virulent hostility" to Boise Cascade's naming BE&K as project construction manager of a $500,000,000 paper mill expansion at International falls, Minnesota. These unions openly disapproved of BE&K's use of non-union employees and non-union subcontractors (as well as union participants or contractors) in the massive construction work there. In sum, the controversy involved the petitioner and its employees and their exercise of their rights to operate, at least in part, free of union contracts in an area in which the trade union had "an extreme depth of concern" about BE&K's "merit shop" operations and what they viewed as a "threat against union labor" by utilization of non-union employees.

We recite hereinafter from the ALJ's findings of pertinent background information. In July, 1989, BE&K obtained a state court temporary restraining order to limit "disruptive picketing activity" and other violent and destructive activity of persons "wearing union insignia from places as far as Michigan." Shortly thereafter, "rumors circulated throughout the community that a large disturbance was about to affect [BE&K's] man-camp" on September 9.

The local had 315 members serving a trade area of Michigan's upper peninsula, just across from International Falls, John LaVallee was the local's business manager and had been since 1973. He was also recording secretary of the North Central States District Council with jurisdiction over an area just adjacent to International Falls. He operated from an office in Marquette. The local furnished 250 persons, a large part of the union, on a paper plant job at Iron Mountain, Michigan, during September, 1989.

Early on September 9, 1989, the International Falls police observed the blocking of nearby roadways and "loud exhortation to . . . trespass" at the BE&K site. A crowd of about 150 "moved

purposefully and ominously" to the man-camp, and, within an hour, a crowd "of over 200 and eventually to total about 450 rioted."

Specifically, the ALJ made the following findings:

> Among persons participating in this riot were those on a chartered bus that had left Iron Mountain, Michigan the night before. This bus departed at about 7 p.m. on Friday, September 8, and arrived in International Falls at about 3 a.m. after the customary 8 hours driving time. Most of the bus passengers were members of Respondent, and as requested the driver let them out at a union hall. The cost of the round trip charter was to be $1,150, and this amount was paid in cash by the unseen act of money being left on the dashboard just before departure. The bus had been scheduled for a midday return trip on September 9, but it was stopped in transit out of International Falls by police. All occupants were formally disembarked as part of investigatory and pre-prosecutive work relative to the riot. It eventuated that 14 persons from the bus were arrested, and from this number Respondent's members William Ahlich, Leslie Bedell and Richard Pascoe, along with former member Daniel (Dan) Miller plus two iron workers then working in travel status out of Respondent's office and three persons in construction trades other than iron workers were convicted after guilty pleas to violating Minnesota law prohibiting riot.

Unlike the Board, we find that clear evidence in the record supports the ALJ's findings (except for the LaVallee-Dabb conversation about a trip to the Twin Cities). Significantly, the bus departed early in the evening from Iron Mountain, where a majority of local union members were working on a large project.

The distance from Iron Mountain, Michigan, to the site of the riot required eight hours of driving before arrival early in the morning in the vanguard of the group that descended upon, trespassed over the man-camp, and then destroyed it. Half of the persons on the bus who started to return to Michigan after the riot were detained by International Falls authorities for investigation. Three local members on he bus later pleaded guilty to riot-related criminal offenses.[2]

BE&K indisputably was a longstanding target of national construction trade unions and a subject of previous violence confrontations by national unions. BE&K was described by them as deserving "attack" and advertisements sought to "motivate building tradesmen in the fight against BE&K." (Reference was made to "the International Paper mills where BE&K is scabbing work.") (Boise Cascade at International Falls was listed at the "top of companies" using BE&K.) Trade union publications urged "solidarity" against BE&K, also described as a "rat" contractor.

Exhibit 43 reflects the names and addresses of the 32 persons exiting the bus on September 9, 1989. Twelve were members or former members of the local. Fifteen others, most of whom were ironworkers who were paying a service fee to the local in connection with work in the Iron Mountain vicinity, were also on the bus. Two were union ironworkers from Michigan and others were ironworkers with unknown addresses. The local "administered a referral program [for] 'travelers' from other Iron Workers locals engaged in Michigan upper peninsula jobs." The 1990 census population of both Iron Mountain and International Falls was about 8,500 each. Aurora, Wisconsin, had a 1990 population of about 1,000. It seems clear from the record that a clear majority of those on the bus were local members, a former member, and "affiliates working out of the local office. Several were arrested in connection with the September 9 rampage. There

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[2] A fourth local member, not on this bus, was arrested and also later pleaded guilty to similar offenses.

can be little doubt that local members and many closely identified with them, having similar interests, were substantially involved in a riot 400 miles away from Iron Mountain and outside the regular union jurisdiction.

The ALJ found that the local used a bus and bus operator from the small town of Aurora, Wisconsin. Another construction trades union from Iron Mountain hired this same bus operator earlier. This prior union-sponsored trip also sparked "violent disruption at BE&K's personnel office" in International Falls" principally from action by this [other] bus load" of trade union activists. The ALJ found that during this key period there was escalation of "extent and frequency of cross-communication between key union functionaries, Peterson [president of Minnesota State Building Construction Trades Council], Salo [business manager of Local 563, Iron Workers located in Duluth, Minnesota, and also an officeholder in the Iron Range Building & Construction Trades Council] and LaVallee."

The ALJ also found that LaValle composed a July 24, 1989 letter on the local's stationary and addressed to local members, which advised that BE&K would perform "Iron Work and other trader work on the [Boise Cascade] project on a non-union basis." He further advised members that "the Union tradesman [sic] on the project have chosen not to work side-by-side with these non-union workers . . . and [are] demonstrating against BE&K." Finally, he advised that local 563 in Minnesota needed financial assistance in "demonstrating their right not to work side-by-side with non-union workers." He closed by asking for weekly voluntary contributions "to assist their efforts." LaVallee did not mail the letter as planned because the International Falls project walkout had not been sanctioned officially, but, as found by the ALJ, "it soon became known that a copy was circulating among iron workers," and "its contents were even printed in a Minnesota newspaper.

Donald Dabb, the bus operator for the fateful September 8-9 trip, was a man of limited memory. He was a long-time

resident of a small Wisconsin town only a few miles from Iron Mountain. He had shortly before been engaged by another Iron Mountain union to make the long roundtrip to International Falls. He said the caller making this reservation identified himself only as one among "concerned persons." Dabb quoted an $1,150 price payable in advance. He testified that cash in that amount was left on the dash of the bus and he could identify only one former local member, Miller on the trip. He could not say whether the return passengers were the same as those who departed the night before. He returned again to International Falls on September 11. He was phoned by the same "concerned persons" to pick up "people . . . that are getting out of jail." He proceeded there on September 11 and did not return until September 13.

The ALJ felt the evidence was "in equilibrium" as to whether LaVallee was part and parcel of promoting the organized gathering at International Falls or whether some other "concerned" person used the local's phone anonymously and "surreptitiously" to arrange the trip for the conspiratorial purpose without the support and the participation of the local itself. The ALJ conceded, and properly so, "extensive knowledge throughout the Iron Mountain community" of the recent violent activity by other construction trade unionists in Iron Mountain.[3] This question of LaVallee's involvement before and during the arrangement for the fateful bus trip, as well as that of the local in light of the background of animosity against BE&K, is a very close one.[4] The Board added little to the lengthy ALJ analysis of twelve telephone calls "that might implicate Respondent local in at least the chartering of Northland coaches." The ALJ found Dabb's testimony to be "without value," discrediting "his failure to recall

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[3]Local 728 Pipefitters subsequently entered into a consent agreement acknowledging responsibility for this episode against BE&K.

[4]LaVallee, for instance, also admitted contacting Northland Bus Company or Dabb "maybe the 10th or 11th of September."

more than one contact" with Local 783 or LaVallee or passengers on the bus. In sum, the ALJ concluded that he could not say "that applicable content [of questioned communications] must have covered impermissible subjects." We express reservations about the ALJ's failure to attribute significance to LaVallee's published urging of his members to help the Minnesota unions in resisting use of any non-union labor on the Boise Cascade project.

We find it unnecessary, despite our reservations about these matters, to decide whether the Board was in error in not finding that the local had restrained and coerced BE&K (and other) employees in the exercise of their guaranteed rights by the local's conduct up to and including the morning of the riot. We conclude, instead, that the Board was in error in its failure to find that the local, through its officers and agents, thereafter ratified, condoned and adopted the unlawful conduct of many of its own members, and affiliated union ironworkers, on September 9, 1989, and that this conduct, together with evidence of its involvement preceding the riot, constituted an unfair labor practice.

On the question of condoning ratifying and approving, we again turn to the findings of the ALJ and the Board. Only a day and a half after the return of the bus to Iron Mountain during the early morning hours of September 11, the "concerned persons" caller in Iron Mountain asked Dabb to return to International Falls "to pick up individuals that had been jailed following their arrests at the bus."[5] ALJ at 8. Dabb testified, surprisingly, that no one paid him for this trip. After consultation with local president Ken Perry following the riot, "LaVallee undertook major relief efforts" to aid arrested union members and those associated with the local. Id. at 9. He travelled to Duluth, Minnesota (the headquarters of Ironworkers Local 563), set up a "base of operations" there and

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[5]As previously indicated, the ALJ stated that nine persons on the September 8-9 trip were not only arrested, but also convicted or pleaded guilty to riot-related charges. A majority of these persons was connected with the local in some fashion.

"spent almost a week in Minnesota," in the process making "one or more trips up to International Falls." Id. LaVallee also arranged a $30,000 loan on September 13 from a Marquette Bank. The loan was described by the bank, the senior vice president, and the loan officer as "a temporary arrangement to accommodate Ironworkers Local – John LaVallee.[6] (emphasis added). This loan was repaid in three installments during October and November, 1989.

"[T]he bank functionaries [were] long familiar with LaValle as the business holder of his union's several accounts." ALJ at 9. He engaged an attorney in Minnesota who was assisting other union members and paid out "$16,000 in bail amounts from the [bank] wired loan proceeds and lesser amount in fines." Id. (emphasis added). Repayment of this loan was made through the contributions of local members, who "were aware of the obligations [LaVallee] had undertaken to post bail." Id.

From bank records, rather than LaVallee's self-serving statements, its is clear that the loan in practical effect was made to accommodate the local. Members of the local paid off the loans and thus provided for those fellow members and their associates who had been involved in criminal conduct to the riot; (1) attorney fees; (2) bail money; and (3) fines, all with respect to their alleged unlawful acts. Local members were unquestionably aware of associated union activities at International Falls and of September plans for large demonstrations in Minnesota directed against BE&K's use of non-union labor at the International Falls project. Lavallee and "his" local membership were aware that these violent happenings were outside their own local's jurisdiction and yet they openly supported, countenanced and, by their conduct, ratified the lawless actions in which their own local union members were involved hundreds of miles away from their own principal

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[6]This information appeared on the loan application itself, and the bank's stated purpose was "to advance funds to assist Ironworker's local."

geographic area.

The parties have admitted that a union may be liable for the unlawful acts of its members under the general agency principle of ratification. The NLRA provides that the full gamut of agency principles applies when determining whether an unfair labor practice has occurred. "In determining whether any such person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." 29 U.S.C. §152(13). Thus, Congress has set out the policy that the usual principles of agency apply in determining liability for unfair labor practices, and that such liability is no restricted merely to express actions. Rather, such liability may be premised on implied or apparent authority. The courts have adhered to this policy and have liberally construed the various principles of agency in determining employer or union liability for an unfair labor practice.

The Supreme Court recognized the need for "unions to exercise a restraining influence on explosive strike situations." United Mine Workers v. Gibbs, 383 U.S. 715, 739 (1965). In Gibbs, the Court applied the agency principle of ratification to determine whether the UMW was liable for violence caused by its members. Id. at 738. The Court noted: "There can be no rigid requirement that a union affirmatively disavow such unlawful acts as previously may have occurred . . . . What is required proof, either that the union approved the violence which occurred, or that it participated actively or by knowing tolerance in further acts ..."

This Court, too, has recognized the need to apply broadly the principles of agency so as to further the NLRA's policy of encouraging parties in a dispute to a peaceful conciliation of their differences. "[I]n determining the responsibility in this area for acts of others, 'the principles of agency and its establishment are to be construed liberally.'" McGraw-Edison Co. v. NLRB, 419 F.2nd 67, 72 (8th Cir. 1969) (citing NLRB v. Arkansas-Louisiana Gas Co., 333 F.2d 790, 795 (8th Cir. 1964). See also Wagner

Electric Corp. v. Local 1104, Int'l Union of Electrical, Radio and Machine Workers, 496 F.2d 954, 956 (8th Cir. 1974) ("A union is responsible for the actions of its officers and members according to the ordinary doctrines of agency").

The NLRB utilizes this same approach. In Service Employees Union, Local 87 (West Bay Maintenance), 291 NLRB 82 (1988), the Board applied the common law principles of agency to determine whether the union was responsible for the unlawful picketing of its members under the theory of ratification. In citing to the Restatement (Second) of Agency, the Board stated that "ratification is defined as 'the affirmance by a person of a prior act that did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him." Id. at 2 (citing §82 of the Restatement). Section 83 of the Restatement defines affirmance as either: "(a) a manifestation of an election by one on whose account an authorized act has been done to treat the act as authorized, or (b) conduct by him justifiable only if there were such an election." Finally, §94 of the Restatement notes that: "An affirmance of an unauthorized transaction can be inferred from a failure to repudiate it." Comment b to §82 states: "Ratification is not a form of authorization, but its peculiar characteristic is that ordinarily it has the same effect as authorization." Thus, if the court determines that the fact of this case are such that the union, through its actions following the destruction of the mancamp, ratified the conduct of its members, we should also find that it is liable for an unfair labor practice.

An analysis of the relevant federal case law discussing the doctrine of ratification under facts similar to the case at bar indicates that the union in this case indeed ratified the unlawful actions of its members. In NCR v. NLRB, 466 F.2d 945 (6th Cir. 1972), cert. denied, 410 U.S. 966 (1973), a case in which the union was found liable for the unlawful picketing of is members, the court found it significant that "the union made no effort to disavow either the union hall statements of its agents or the picket line incidents." Id. at 961. In Airco Speer Carbon-Graphite v. Local 502, Int'l Union

of Electrical, Radio & Machine Workers of America, 494 F. Supp. 872 (W.D. Pa. 1980), a case where the court determined the union ratified an illegal work stoppage, the court noted that the union's failure to "disavow or censure the actions of the striking union members" was indicia of ratification. Id. at 877. Furthermore, the court attached great significance to the fact that "[b]ail bonds for eighteen arrested pickets, which were authorized by the Union Executive Board, were signed by either the President or the Treasurer of Local 502." Id. In C & K Coal Co. v. United Mine Workers, 704 F.2d 690 (3d Cir. 1983), a case in which the court found that the union ratified the unlawful picketing of its members, the court noted union involvement in the illegal activities because "the President of the District, acting within the scope of his authority and the approval of the Executive Board, established a legal defense fund for the payment of fines, counsel fees and costs, as an encouragement for illegal activity." Id. at 696. The court went on to note that "[t]he voucher payments were made from District 5's general fund with knowledge that the pickets being paid had engaged in illegal secondary activity. Payments from the legal defense fund were made with the same knowledge." Id. In East Texas Motor Freight, 262 NLRB 858 (1982), a case in which the Board found that the union unlawfully restrained the rights of its members, it held that the union's failure to reprimand the illegal activities of one of its stewards or prevent him from engaging in any such conduct in the future constituted a ratification. See also, to this same effect, Quick Air Freight, Inc. v. Teamsters Local Union No. 413, 575 N.E. 2d 1204, 1211 (Ohio Ct. App. 1989)(whether the union's officers took steps to prevent a repetition of violent acts in the future a factor to consider in whether ratification occurred); Int'l Union, United Automobile, Aircraft and Agricultural Implement Workers of America v. American Metal Products Co., 408 S.W.2d 682, 692 (Tenn. Ct. App. 1964) (fact that union furnished bail bond and attorneys to union members charged with violent conduct indicia of ratification).

In analyzing these principles of agency, along with the examples of ratification in cases where liability was found on

similar facts, we conclude that the local has committed an unfair labor practice in condoning and failing to disavow the unlawful acts of its members. In reaching this decision, we are mindful of the deference we must give to the factual findings of the ALJ and the Board. Our standard of review on this question of fact is whether the ALJ and NLRB's decisions are supported by substantial evidence in the record when considered as a whole WCCO Radio v. NLRB, 844 F.2d 511, 514 (8th Cir.), cert. denied, 488 U.S. 824 (1988) (emphasis added).

Perry, the local president, conceded that "everybody's been telling me" about collections from local members "to help out the guys over in Minnesota."[7] According to the longtime local office secretary, no record was made by the local members of the cash contributions used "to help those people in Minnesota."[8] anderson testified that she was "not supposed to record" these contributions, "because that's outside of our Local business, it's not our regular business." It happened, she estimated, "between ten and a hundred times."[9] but she could not say exactly how often these "sporadic" gifts came into local headquarters. Regardless, Anderson accepted custody of the money for the designated purpose. Whether LaVallee was also aware of any contributions "for Minnesota" before September 9 is unclear, but, in any event, custody of the money was maintained in a locked drawer under LaVallee's control. LaVallee opened an account with the bank which made him the loan after the riot. The ALJ noted Beatrice Anderson's obvious self-interest as a

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[7]Those telling him included ironworkers, pipefitters, boilermakers, laborers, and operators.

[8]Anderson, the Secretary, could not identify the specific persons who brought the contributions in nor the precise dates, but she said "it comes in form job stewards" and sometimes had a note with it: "collection for Minnesota."

[9]Anderson also said "ten, twenty, fifty, I can't remember that."

longtime office employee "working under and alongside LaVallee."[10]

LaVallee conceded that the local had no contractual relationship with Boise Cascade, BE&K, nor any of the latter's subcontractors. He also admitted the local had no jurisdiction in Minnesota. LaVallee, nevertheless, felt it "appropriate to assist [other Minnesota] unions" with regard to the Boise Cascade-BE&K project. He conceded that union activity there "wasn't a sanctioned activity." He also conceded, after September 9, that "it became common knowledge that I had borrowed a substantial amount of funds to get some people out of a biind in International Falls," and he received contributions from local members to repay the loan after mid-September. Indeed, LaVallee was himself making preparations with Dabb to rent a bus or busses to transport his local members to Minnesota, but he claimed that this was for another rally or demonstration in the Twin Cities the following Saturday. The contributions, LaVallee admitted, were to repay costs of posting bail and providing an attorney for persons arrested as a consequence of the riot after being told "what the hell happened here" there. LaVallee was interested in the BE&K project because "we faced a similar situation . . . [and] we're very familiar with the situation that various local unions . . . faced with Boise Cascade and BE&K." He conceded also having "general [not specific] knowledge" of the local Michigan pipefitters unions involvement at International Falls.

The union paid LaVallee's expenses in Minnesota, including costs of making arrangements for obtaining bail and

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[10]LaValle discussed with Anderson, before she testified, the unfair labor practice charges against the union and local's position with regard to these charges. We find it difficult to credit Anderson's testimony about contributions before September 9 and LaVallee's denial of any contributions before that date. What is important on the issue of ratification, however, is the making and handling of the unions members' collection after the riot.

legal representation for the local's arrested members. LaVallee testified at the hearing: "I didn't collect any money." (emphasis added). It seems logical to infer that the local then must have been the entity which collected the money to pay the loan arranged by LaVallee used to defray legal expenses for the members and others in International Falls. Some of the ironworkers who had worked, but walked off the BE&K job in Minnesota, "ended up working with us [the local]," according to LaVallee. LaVallee testified that he bailed out six local members and "maybe some others,"[11] and paid $30,000 to attorney Steve Nelson "to get people out of jail." LaVallee also testified that contributions came in to repay the local through the end of 1989, but bank records reflected repayment of the loan by November, 1989. He also said that he used his "own money or the union's money" (emphasis added) to pay bail money.

While we draw no adverse inference in this case against LaVallee for his refusal to answer questions based on a claimed Fifth Amendment privilege, "the Fifth Amendment does not forbid adverse inference against parties to civil actions when they refuse to testify in response to probative evidence offered against them" (citing Baker v. Palmigiano, 425 U.S. 308, 318 (1976)). See Cerro Gordo Charity v. Fireman's Fund American Life Ins. Co., 819 F.2d 1471, 1480 (8th Cir. 1987).

Contrary to the Board, we think it is irrelevant to observe that local members were merely exercising a "legal constitutional right" to obtain bail and legal assistance. The Board's reliance on this red herring led it to infer that LaVallee's assistance to the local members was not "condonation or ratification by the [local] of the alleged misconduct." Just because the members' individual exercise of legal or constitutional rights may have been involved does not mean that the local, by contributing and taking collective

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[11]Among those on whose behalf LaVallee acted was Don Miller, the suspended or former local member who was on the bus trip.

action through LaVallee to bring about their release, did not condone or ratify their underlying conduct. The Board's rationale flies in the face of the Gibbs decision (and its progeny) dealing with the principles of agency.

We construe the Board's rationale to be that even if violent acts and rioting were the bases for arrest of members, and even if the local members had been involved in assisting and aiding unsanctioned violent activity outside the local's jurisdiction, and even if the local's chief officer were spending the time and money of the local in pursing release of these members and others a substantial distance away from the local's territory, that there could be no ratification or condonation since those arrested were "presumptively innocent" of the charges. The Board failed to note that there were never any disavowal by LaVallee or the local of the riotous conduct even after guilt was clear and admitted. The Local agent's conduct in assisting those who had engaged in unsanctioned activity (regardless of ultimate guilty pleas) and his conduct throughout in opposing BE&K speak louder than his words. The attempt to hide the local's participation and approval by keeping no record of contributions and characterizing the loan was merely personal also point to ratification within the meaning of McGraw-Edison. There was also evidence to indicate actual participation or instigating activity in the wrongful conduct on the part of the local.

The Board failed to note also that the local had no duty to involve itself in assisting individual members in conduct of this kind. LaVallee was a volunteer on the scene attempting to provide legal assistance for a number of persons arrested at the scene of the riot some 400 miles distant from the principal project in which the local was engaged.

The substantial circumstantial and direct evidence of condonation and ratification detracts strong from "the weight of the decision" of the Board. Schnuck Markets, 961 F.2d at 704. If it be true that "circumstantial evidence standing alone may sustain a [criminal] conviction so long as the totality of the

evidence was substantial enough,"[12] then such evidence in a civil proceeding may be sufficient to overcome the acceptance by the ALJ of LaVallee's testimony.[13] The ALJ's acceptance of LaVallee's testimony was misguided. We note that LaVallee invoked his Fifth Amendment privilege based upon advise from an attorney who represented both the local and LaVallee personally.

Among the other circumstantial evidence that must be taken into account is testimony indicating that the gathering of union adherents at International Falls on September 9 (the local members were being in the vanguard) was obviously planned and organized. Most of those present, like the group from Iron Mountain, Michigan, came from a distance and were not International Falls people. There was longstanding hostility and animosity towards BE&K by LaVallee and his fellow union chiefs in the upper peninsula-Minnesota area. There was pervasive rumor and expectation of a "watershed event" on September 9. LaVallee favored active assistance of Minnesota unions by the local. there was never any expression of disapproval by LaVallee or the local of extended violent activity against BE&K (or Boise Cascade). LaVallee's presence in Minnesota, along with the strong inference of local support and approval, in conjunction with post-riot assistance to those engaged in the supposed unauthorized conduct, including both local members and others associated with them, showed condonation and approval of these actions.

There was no proof that LaVallee or the local had any direct business relationship with International Falls; there was no showing of any duty whatsoever imposed upon LaVallee to undertake this post-riot sustained activity in Minnesota. Nor was there any legal right of the arrested persons, local members or

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[12]See United States v. Phibbs, 999 F.2d 1053, 1064 (6th Cir. 1993), cert. denied, 114 S. Ct. 1070 (1994).

[13]The ALJ acknowledged "a painstakingly-mounted collection of circumstantial evidence" presented by the General Counsel.

others, to receive financial help from the union's contributions (or from the loan) for bail, legal fees or fines. There was direct proof of local post-riot contributions to support LaVallee in his post-riot activity and that the bank intended to make the local to or for the benefit of the local rather than for LaVallee personally. the strong weight of all this evidence cannot be disregarded by giving credibility to LaVallee's hearing testimony and refusing to draw obvious inferences from the evidence herein discussed. The degree of support LaVallee provided to the incarcerated local union members, in conjunction with the financial and moral support he received in his endeavors, showed his apparent, if not actual, authority to act on the union's behalf in its ratification of the unlawful acts.

Because the strong and convincing proof in this case demonstrates condonation and ratification by the local under long standing agency principles, we conclude that the local is guilty of the unfair labor practice charges made against it. This proof is buttressed by evidence that the local, through its agent LaVallee, also actively participated or assisted in violent acts against BE&K, its employees, and subcontractors. We make no finding, however, that the ALJ erred in his somewhat ambivalent conclusions about the local's actual participation.

Accordingly, we **REVERSE** the decision and order of the Board and **REMAND** to the Board for further proceedings consistent with our opinion in this case.

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On April 29, 1992, Administrative Law Judge David G. Geilbrun issued the attached decision. The Charging Party filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The National Labor Relations Board has considered the decision and the record[1] in light of the exceptions and briefs and

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[1]In the third paragraph of sec. 11.C.2 of his decision, and in the first paragraph of sec. 11.F.4.e. the judge stated, respectively, (1) that most of the passengers on the chartered bus from Iron Mountain, Michigan, to International Falls, Minnesota, on September 8-9, 1989, were members of the Respondent, and (2) that the passengers on the bus were drawn primarily from the Respondent's membership. But the record does not actually reveal the names or organizational affiliations of the passengers who were on the bus to International Falls. The record does, however, reveal the names and union affiliations of the passengers who were on the bus as it began its *return trip from* International Falls later in the day on September 9. There were 32 passengers on the bus then, 11 of whom were members of the Respondent.

In the fourth paragraph of sec. 11.E of his decision, the judge stated that bus owner Donald Dabb testified that Respondent Business Manager John LaVallee telephoned him in late summer 1989 to ask about chartering a bus for a trip to "Minnesota." Dabb's testimony at the hearing, however, which was consistent in this regard with his testimony in an earlier deposition that is in evidence, was that LaVallee asked about a trip to "Minneapolis."

In fn. 3 of his decision, the judge stated that Ralph

has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

We abhor the rioting, violence, physical attacks, and property damage that occurred at the Charging Party's man-camp on September 9, 1989. But we agree with the judge that the General Counsel has not established by a preponderance of the evidence that the Respondent participated in this misconduct, or that it is otherwise responsible for it.

We note in this connection that the Charging Party has excepted, inter alia, to the judge's finding that the activities of Respondent Business Manager John LaVallee in personally arranging but not paying for legal representation and posting bail for the Respondent's members who were arrested in Conjunction with the riot did not constitute condonation or ratification by the Respondent of the misconduct that its members were at that point

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Guentzel was a member of the Respondent. The record establishes that Guentzel was a member of Iron Workers Local 563, but not that he was also a member of the Respondent. From the context of his fn. 3, it appears that the judge meant to refer to Robert Genschow, a member of the Respondent who was convicted of riot, but who was not on the bus when it began its return trip from International Falls on September 9, 1989.

Finally, in the sixth paragraph from the end of sec. II.G of his decision, the judge inadvertently referred to the deposition of Kenneth Perry as Jt. Exh. 40, rather than 39.

[2]The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3rd Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

alleged to have engaged in. For the reasons set forth below, we find no merit in this exception.

Four members of the Respondent did ultimately plead guilty early in 1990 to criminal charges of riot. But at the time LaVallee posted bail for them and for others who were also arrested, no judicial determination had yet been made that any of them had engaged in any unlawful act, and they were thus still presumptively innocent of any wrongdoing. Indeed, three of the seven members of the Respondent who were arrested were subsequently released.

Under these circumstances, we find LaVallee's personal activities on behalf of members of the Respondent was not condonation or ratification by the Respondent of the alleged misconduct for which the members had been arrested.[3] Rather, LaVallee merely assisted certain of the Respondent's members to exercise a legal and constitutional right. Accordingly, the judge properly refused to hold the Respondent liable for the misconduct under principles of condonation and ratification.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated Washington, D.C. May 28, 1993

James M. Stephens, Chairman

[3]We note that LaVallee obtained a personal loan which he used for these activities. This loan was repaid approximately 2 months later through contributions made by the Respondent's members and others.

Dennis M. Devaney, Member

Clifford R. Oviatt, Jr. Member

(Seal) NATIONAL LABOR RELATIONS BOARD

(2)

Supreme Court, U.S.
FILED
OCT 17 1994
OFFICE OF THE CLERK

No. 94-458

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

LOCAL 783, BRIDGE AND STRUCTURAL AND ORNAMENTAL IRONWORKERS,

Petitioner,

v.

BE&K CONSTRUCTION CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

J. ROY WEATHERSBY*
DION Y. KOHLER
OGLETREE, DEAKINS, NASH, SMOAK & STEWART
One Atlantic Center
1201 W. Peachtree St., N.W.
Atlanta, Georgia 30309
(404) 881-1300
Counsel for Respondent.

**Counsel of Record*

October 17, 1994

Washington, D.C. • THIEL PRESS • (202) 239-3266

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QUESTION PRESENTED

Whether the court of appeals' holding that a union ratified and condoned its members' unlawful, violent conduct by paying for their bail, legal fees, and fines and by other acts, without disavowing such unlawful acts, conflicts with applicable decisions of the Court.

LIST OF PARTIES

The parties to the proceeding are petitioner, Local 783, Bridge, Structural and Ornamental Iron Workers, respondent BE&K Construction Co.[1], and the National Labor Relations Board.

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[1] BE&K Construction Co.'s parent company is BE&K, Inc. BE&K Construction Co. is affiliated with the following companies:

154211 Canada, Inc.
Allstates Design & Development Co., Inc.
BE&K of Delaware, Inc.
BE&K Engineering Company
BE&K Environmental, Inc.
BE&K Properties, Inc.
BE&K of Texas, Inc.
Danes Construction Company, Inc.
Quality Maintenance, Inc.
Tool Specialty, Inc.
ViaTech Services, Inc.

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No. 94-458

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

LOCAL 783, BRIDGE AND STRUCTURAL AND ORNAMENTAL IRONWORKERS,

Petitioner,

v.

BE&K CONSTRUCTION CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent BE&K Construction Co. ("BE&K") opposes Local 783, Bridge, Structural and Ornamental Ironworkers' ("Union") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

STATEMENT OF THE CASE

1. Introduction

This case involves one of the worst episodes of labor violence by organized labor against non-union employees in recent decades. On September 9, 1989, a mob of about 450 unionists and others stormed BE&K's temporary housing facility in International Falls, Minnesota, and destroyed it, causing over $2,000,000 in property damage and serious personal injuries to a number of persons trying to protect the property. Following the riot, police detained twenty-seven current or former members of the Union and members of other Ironworker Locals working out of the Union's hiring hall leaving International Falls on a chartered bus. 23 F.3d at 1463. The bus had traveled through the night, from a town over 400 miles away, located near the Union's offices where most of its members were working at the time. *Id.* Fourteen of those detainees were arrested and a lesser number conficted of various criminal acts committed during the riot. *Id.* at 1463-64.

For many months preceding the riot, the unionized construction trades, including the Ironworkers, expressed "animosity" and "virulent" hostility towards Boise Cascade for naming BE&K the contractor to perform a large expansion of its paper mill in International Falls. *Id.* at 1462. There were well-publicized incidents of union violence against BE&K employees preceding the riot. *Id.* at 1462, 1464. John LaVallee, the Union's long time business manager, was interested in the BE&K project and urged his membership to assist the Minnesota unions in resisting the use of non-union labor on the Boise Cascade project. *Id.* at 1464, 1468-9.

The bus used to make the trip was hired surreptitiously under the name "concerned persons." *Id.* at 1464. LaVallee had telephone contact with the owner of the bus less than eight hours before the bus departed for International Falls. 311 NLRB at 741-42.

Following the riot, after consultation with the Union's President, LaVallee traveled to Minnesota, set up a "base of operations," and undertook "major relief efforts" to aid his arrested members and affiliates. 23 F.3d at 1465. These efforts, which took almost a week and several trips to International Falls, included obtaining a loan of $30,000 from the Union's bank, given as an accommodation to the Union. *Id.* These funds were used to provide arrested members and affiliates with money to pay bail, attorneys fees, and fines levied upon their convictions for criminal conduct. *Id.* The loan was repaid with contributions collected by the Union from members in less than a two-month period. *Id.*

The Union never disavowed or otherwise expressed disapproval of the unlawful acts of violence committed by its members and affiliates during the riot. *Id.* at 1469. No disciplinary action was taken against the Union's members who were ultimately convicted of criminal conduct. 311 NLRB at 743.

2. The Decision of the Administrative Law Judge

The Administrative Law Judge (ALJ) dismissed the Complaint. While acknowledging concern over the evidence of LaVallee's involvement, the ALJ found that the evidence of the Union's actual involvement in planning and instigating the attack on BE&K settled into a "state of equilibrium." 311 NLRB at 742. The ALJ viewed the Union's post-riot assistance to participants in the riot as a permissible "fraternal phenomenon." *Id.*

at 743. The ALJ further found that the Union should not be expected to discipline its members convicted of criminal acts during the riot because such conduct was "not inimicable [sic] to trade union objectives in the Boise Cascade dispute." *Id.*

3. The Decision of the National Labor Relations Board

The National Labor Relations Board ("Board") affirmed the findings of the ALJ with minor modifications. The Board viewed the post-riot assistance rendered by the Union as mere assistance to its members in the exercise of a "legal and constitutional right." *Id.* at 734. Thus, the Board did not consider these activities as evidence of condonation and ratification of unlawful acts committed by members during the riot.

4. The Decision of the Court of Appeals

The Court of Appeals for the Eighth Circuit reversed. While expressing reservations about the ALJ's failure to find that the Union was actually involved in participating in the bus trip, the court of appeals found it unnecessary to reach this question. 23 F.3d at 1465. Instead, the court of appeals held that the Union's post-riot conduct, together with evidence of its involvement preceding the riot, constituted ratification and condonation of the unlawful acts of its members and affiliates. *Id.* This conduct included the payment by the Union with Union funds of fines for members convicted of criminal activity during the riot. *Id.* at 1469.

SUMMARY ARGUMENT

The decision of the court of appeals is consistent with applicable prior decisions of the Court addressing the liability of labor unions for unfair labor practices committed by its members. The court of appeals' finding that the Union ratified and condoned its members' unlawful conduct by providing extensive post-riot assistance, including the payment of fines for convicted members, is consistent with common law agency principles and federal labor policy.

ARGUMENT

I.

THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH APPLICABLE DECISIONS OF THE COURT.

The Court has long recognized that union responsibility for the acts of its officers and members is under ordinary agency principles. *United Mine Workers v. Gibbs*, 383 U.S. 715, 737 (1966). In *United Mine Workers v. Gibbs*, the Court recognized that ratification by a union of violence by its members does not occur merely because the union subsequently becomes involved in the dispute by engaging in "normal union functions," such as strike relief. *Id.* at 738. As the court of appeals observed, the rationale for this rule is to encourage unions to exercise a restraining influence and curb the unlawful activity. 23 F.3d at 1466, *citing Gibbs*, 383 U.S. at 739.

In the instant case, the post-riot activities of the Union were far removed from normal union functions and were wholly unrelated to curbing any unlawful activity. These activities by the Union included: expending a week

of the business agent's time, while on the union's payroll and expense account, to arrange bail and legal representation for arrested union members and affiliates; borrowing $30,000 from the Union's bank to pay for bail, legal fees, and fines for arrested members, including those who were convicted; LaVallee traveling over 400 miles to the location of the riot, where the union had no direct business relationship, to render such assistance; orchestrating collection activities among the Union's members to finance its payment of bail, legal fees, and fines; and attempting to conceal its participation and approval of such actions. 23 F.3d at 1469. Thus, the court of appeals' decision that these activities evidenced the Union's ratification and condonation, absent disavowal of its members' misconduct, is not contrary to the Court's decision in *United States v. Gibbs. See also* RESTATEMENT (SECOND) OF AGENCY, §§94, 83 (1958).

The court of appeals' decision is also consistent with the Court's decision in *Carbon Fuel Co. v. United Mine Workers,* 444 U.S. 212 (1979). In that case, the Court held that an international union was not responsible for extensive "wildcat" strikes by local unions because the International had no obligation to use *all* reasonable means to end the strikes. *Id.* at 217. (Emphasis added.) Thus, the Court rejected the employer's claim that the union was responsible because it failed to discipline participants where the international took other preventative measures, such as advising members that they could be disciplined and expressing repeatedly opposition to wildcat strikes.[2] *Id.* at 213 n.1, 218.

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[2]The Court accepted the international's explanation that it took no disciplinary action out of concern that it would aggravate the situation. 444 U.S. at 213 n.1.

In the instant case, neither LaVallee nor the Union ever made any expression of disapproval of the extended violent activity by the Union's members against BE&K. 23 F.3d at 1469. Further, the court of appeals did not base its finding of ratification and condonation on the Union's failure to discipline its members who participated in the riot.

In *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344 (1921), an action under the Sherman Antitrust Act, the Court held that a national union did not ratify the anti-competitive strike conduct by its local unions when its President mentioned the strike in speeches and thanked the President for pardoning a District President convicted of criminal strike misconduct. *Id.* at 394. Contrary to the characterization of the Petitioner herein, the Court did not hold that failure to disavow the misconduct of its members or to take disciplinary action could not constitute evidence of ratification or condonation. Instead, the Court held only that a national union which has not authorized or participated in a local strike has no duty to "superintend it and to intervene" to prevent unlawful conduct. *Id.* at 395. Thus, *Coronado Coal* does not conflict in any way with the decision below in the present case, where the court of appeals found that the Union indeed ratified and condoned the unlawful conduct by its pre- and post-riot acts.

The decision of the court of appeals is also consistent with the decisions of other courts applying the holdings of the Court. *C&K Coal Co. v. United Mineworkers*, 704 F.2d 690, 696 (3d Cir. 1983) (payment of fines, counsel fees, and costs for strikers not "humanitarian" act, but evidence of ratification); *NCR v. NLRB*, 466 F.2d 945, 961 (6th Cir. 1971), *cert. denied*, 410 U.S. 966 (1973) (failure to disavow members' misconduct constituted

ratification); *Airco Spear Carbon-Graphite v. Local 502, Int'l Union of Electrical, Radio & Machine Workers of America,* 494 F. Supp. 872, 877 (W.D. Pa. 1980) (local union president's failure to disavow or censure illegal work stoppage and posting of bail bonds for arrested pickets constituted ratification); *Int'l Union, United Automobile, Aircraft and Agricultural Implement Workers of America v. American Metal Products Co.,* 408 S.W.2d 682, 692 (Tenn. App. 1964) (furnishing bail bonds and attorneys to union members charged with violent conduct evidenced ratification by international union).

The court of appeals correctly rejected the Board's holding that the Union merely assisted members to exercise a legal and constitutional right. 23 F.3d at 1469-70. The Board failed to consider that the Union's assistance included payment of fines for members ultimately convicted of criminal conduct in connection with the riot, a fact conspicuously absent from the Union's petition to this Court. In addition, the court of appeals correctly noted that the Union had no duty to provide such assistance, and its members had no legal right to receive such assistance from the Union. *Id.* Thus, the court of appeals properly found that by providing such assistance to arrested and convicted members, absent disapproval of their unlawful conduct, the Union ratified and condoned their unlawful actions.

II.

THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH FEDERAL LABOR POLICY AND DISCOURAGES THE USE OF VIOLENCE IN LABOR DISPUTES.

Unlike the Board's decision, the decision of the court of appeals is consistent with a fundamental tenet of the National Labor Relations Act, fostering the peaceful resolution of labor disputes. 29 U.S.C. §151 (1973 & Supp. 1994); *Legislative History of the National Labor Relations Act, 1935,* 2 NLRB at 2300 (1949) (the "first objective of the bill is to promote industrial peace"); *United Mine Workers v. Gibbs,* 383 U.S. at 739. The Board's decision sends an unequivocal message to organized labor that is inimical to the fundamental premises of American labor law: unions can target non-union companies and their employees for attack, urge their members to take action against them, during the course of which members can commit reprehensible acts of violence to intimidate non-union employees and their union will be there to bail them out of jail, provide legal representation and even pay their fines when convicted. Without question, this policy would encourage the use of violence and intimidation as a tactic in labor disputes. The court of appeals, consistent with national labor policy and the rulings of this Court, prevented this by holding that the Union ratified and condoned the unlawful conduct.

CONCLUSION

For the foregoing reasons, certiorari should be denied.

Respectfully submitted,

J. ROY WEATHERSBY*
DION Y. KOHLER
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART
3800 One Atlantic Center
1201 W. Peachtree St., N.W.
Atlanta, Georgia 30309
(404) 881-1300
Counsel for Respondent.

**Counsel of Record.*

APPENDIX

UNITED STATES OF AMERICA

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES

SAN FRANCISCO BRANCH OFFICE

CASE 18-CB-2021

IRON WORKERS LOCAL NO. 783,
INTERNATIONAL ASSOCIATION OF
BRIDGE, STRUCTURAL AND ORNAMENTAL
IRON WORKERS, AFL-CIO

and

BE&K CONSTRUCTION COMPANY

Everett Rotenberry,
Counsel for the General Counsel.

Dion Y. Kohler, (Ogletree, Deakins,
Nash, Smoak & Stewart),
Atlanta, GA, and
Lowell J. Noteboom, (Leonard, Street & Deinard),
Minneapolis, MN, for Charging Party.

Nino E. Green, (Green, Renner, Weisse, Rettig,
Rademacher & Clark, P.C.),
Escanaba, MI, for Respondent.

DECISION

STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge: This case was heard at Minneapolis, Minnesota, over a course of 4 trial days comprising April 16-19, 1991 inclusive. The charge was filed January 29, 1990 by BE&K Construction Company, for brevity called BE&K, and the complaint was issued December 14, 1990. The primary issue is whether Iron Workers Local No. 783, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, called Respondent, restrained and coerced employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act by participating in a riot in violation of Section 8(b)(1)(A) of the Act.

On the entire record, including my observation of the demeanor of witnesses, and after consideration of briefs filed by all parties, I make the following:

FINDINGS OF FACT

I. JURISDICTION

BE&K is a Delaware corporation which maintained an office and place of business in International Falls, Minnesota, where at all times material herein it was engaged in construction and installation of industrial facilities, machinery and equipment. During calendar year 1990 BE&K, in the course and conduct of such business operations, purchased and received products, goods and materials at this jobsite valued in excess of $50,000 directly from points outside the State of Minnesota. On these admitted facts I find that BE&K is, and at all times ma-

terial herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and that Respondent, as also admitted, is, and at all times material herein has been, a labor organization within the meaning of Section 2(5).

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. OVERVIEW

On September 9, 1989 a riot happened at the employee housing center for a large construction project in northernmost Minnesota. Extensive background events were plainly associated to this riot, which took many forms touching political, business, trade union, and community interests.

The essential context was institutional and ideological friction when a major industrial construction company undertook a locality-sensitive papermill expansion by its habitual approach of operating nonunion. Respondent is here accused of complicity in this labor dispute-based riot, both by intention and by covert action.

B. GEOGRAPHIC AND ORGANIZATIONAL MATRIX

The enormous amount of activity which this case concerns took place along a crescent of the norrthern Great Lakes area. This ran generally from Marquette situated at a central point in Michigan's upper peninsula, westerly through the tip of Wisconsin to round by Duluth, Minnesota at the end of Lake Superior, and turn northerly to International Falls situated at the Canadian border. This total distance is about 400 miles. As a factor in the variout communicating, venturing, and miscellaneous itineraries that occurred, I also identify Iron Mountain, Michigan. This city is akin to being the hub of a small popula-

tion locale almost astride the Michigan-Wisconsin state line about 75 miles southwest of Marquette, and where much of the case focus truly relates.

Respondent, an organization of 315 members, is a local affiliate of the Iron Workers International Union. the offices of which are in Washington, DC. Its designated trade jurisdiction coincides with the area of Michigan's upper peninsula. At the Michigan-Wisconsin state line this adjoins the comparably understood geographic jurisdiction of Iron Workers Local 563 situated in Duluth. Respondent's intermediate union affiliations are principally as constituent of the Iron Workers International Union, or with organizations of the unionized building trades as these comprise and draw from various construction crafts. In this sense Respondent is a part of the Iron Workers North Central States District Council, the Upper Peninsula Building and Construction Trades Council and, to illustrate parallels with Local 563, the Michigan State AFL-CIO and the Michigan State Building and Construction Trades Council (BCTC). John LaVallee has been Respondent's business manager, financial secretary and treasurer since 1973. He operates from an office in Marquette, situated in a building shared with other unions. The only other fulltime paid employee of Respondent is Beatrice Anderson, an office secretary of over 20 years service with the organization. Kenneth (Ken) Perry is Respondent's elected president and the only other person within the organization other than LaVallee who possesses pronounced executive and financial authority. LaVallee holds concurrent office in the North Central States District Council as its recording secretary.

Escanaba, Michigan is a city on the north shore of Lake Michigan about 60 miles south of Marquette.

Quinnesec is a small community in Michigan only several miles from Iron Mountain. During the summer of 1989 Respondent had members employed on major construction jobs at both Escanaba and Quinnesec. The smaller of these at Escanaba was a project for owner Mead Paper Company with Fru-Con of St. Louis, Missouri as the general contractor. Respondent had reached a project agreement with Fru-Con for this job, and over the course of its approximately 2 years duration furnished a fluctuating crew of iron workers ranging from 20 to 50.

The Quinnesec job was a $350,000,000 paper machine installation for Champion International Paper, which also ran about 2 years for completion. Rust Engineering served as a unionized general contractor for this project. The peak employment of iron workers furnished by Respondent for Quinnesec was about 250 during the eventful September-October 1989 timespan.

Besides these two main projects Respondent had about 150 of its members employed with 25 or so other contractors at various locations within its jurisdiction. In keeping with typical craft union practices Respondent also administered a referral program from its Marquette office. Under this "travelers" from other Iron Worker locals, predominantly the adjoining Local 563 and often, too, from North Dakota Local 793, would work at the trade for contractors engaged in Michigan upper peninsula construction jobs.

Local 563 is a member of the Iron Range Building and Construction Trades Council covering northern Minnesota, the same Iron Workers North Central States District Council, the Minnesota State AFL-CIO and the Minnesota State BCTC. The business manager of Local 563 is Fred Salo, an individual who also concurrently holds

office in the Iron Range BCTC. The president of Minnesota State BCTC is William (Bill) Peterson, whose office is in St. Paul.

C. CONDENSED BACKGROUND

1. Preceding the Riot

In 1988 Boise Cascade announced plans for a $500,000,000 plan expansion of its papermill at International Falls. Initially Fru-Con was expected to handle the project and building trades unions, urgently interested in securing a union mode on the imminent construction work, negotiated for several months with Fru-Con. In March 1989 Boise Cascade actually awarded the expansion project to BE&K, after a large demonstration for public support of a union contract manager had been arranged by local unions around International Falls.

Actual work by BE&K began in early July 1989 with over 100 employees of its own, and subcontractor awards to both union and nonunion employers. By mid-July approximately 100 construction workers were also on the site for various union subcontractors. BE&K's own employees, in keeping with its operating style, were nonunion as were persons employed by any nonunion subcontractor which by then had commenced its phase of the project.[1]

On July 18 a walkout by the unionized construction trades personnel occurred, and disruptive picketing activity at the jobsite commenced in protest of BE&K and nonunion subcontractors. Within several days BE&K

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[1] All dates and named months hereafter are in 1989 unless otherwise indicated.

obtained a temporary restraining order which limited picketing activity and restored a measure of control regarding the dispute. BE&K soon replaced the subcontractors whose union workers had walked out with nonunion subcontractors, and the project continued on that adjusted basis as the summer months passed.

On August 28 a major incident occurred at an employment center maintained by BE&K in a post office basement near the jobsite. Early on that Monday morning this employment office, at which several dozen hires were completing paperwork preliminary to their job orientation, was descended upon by protesters. A crowd of about 40 persons began a menacing disturbance around 7:45 a.m. From their congregation on the outdoor sidewalk they burst down the stairwell and into the personnel lobby, yelling obscenities, vandalizing the application process, and generally intimidating persons inside. Both police and the Vance International Security Service used by BE&K were summoned, and the disturbance was quelled in its serious stage. However, many of the perpetrators remained for several hours outside, performing threatening or distructive activity. Members of this crowd were wearing clothing with union insignia from places as far as Michigan, and they keyed much of their demonstration ire to the theme of "rat(s)" as their objective of protest.

By early September a specialty builder hired by BE&K had finished early phases of an employee housing center located about 2 miles from the actual Boise Cascade expansion project. As ultimately intended for occupancy by about 1,000 persons in dormitory style living, it was then in use by over 100 plus several dozen Vance personnel also housed within this fenced "mancamp." Just prior to September 9 rumors circulated

throughout the community that a large disturbance was about to affect the man-camp.

2. The Riot of September 9

Early in the morning of September 9 large groups began assembling near the man-camp, most of them after arriving from outlying or distant points. The situation was under monitoring by law enforcement authorities, as most prominently under the command of International Falls Police Captain Randy Borden. This officer had reacted to the fully circulating rumor by a special dispersal of his own and auxiliary law enforcement personnel to best position themselves for the rumored event. By as early as 6 a.m. on September 9 it was apparent to Borden that trouble was imminent because of roadways being blocked and loud exhortation to at least trespass.

In further reaction to the rumored event BE&K had canceled work at the project for that Saturday, and had evacuated all resident employees of the man-camp the night before. As the early morning hours of September 9 unfolded the gathered crowd of about 150 persons moved purposefully and ominously from their point of congregation in the city to the man-camp location. Borden deployed his 15 available police offices to the scene as size, mood and momentum of the crowd increased. From about 7 a.m. and for nearly the next hours, the crowd now grown to over 200 and eventually to total about 450, rioted during a breaking down of fencing at the man-camp. This was followed by extensive destruction after they had surged inside the facility and caused personal injury to some Vance guards by rock throwing and physical beatings. Vehicles inside the man-camp were damaged and overturned, dormitories and their contents were vandalized, and various buildings

set afire before the rioters withdrew. The monetary total of loss associated to the riot was approximately $2,000,000.

Among persons participating in this riot were those on a chartered bus that had left Iron Mountain, Michigan the night before. This bus departed at about 7 p.m. on Friday, September 8, and arrived in International Falls at about 3 a.m. after the customary 8 hours driving time. Most of the bus passengers were members of Respondent, and as requested the driver let them out at a union hall. The cost of the round trip charter was to be $1,150, and this amount was paid in cash by the unseen act of money being left on the dashboard just before departure. The bus had been scheduled for a midday return trip on September 9, but it was stopped in transit out of International Falls by police. All occupants were formally disembarked as part of investigatory and pre-prosecutive work relative to the riot. It eventuated that 14 persons from the bus were arrested, and from this number Respondent's members William Ahlich, Leslie Bedell and Richard Pascoe, along with former member Daniel (Dan) Miller plus two iron workers then working in travel status out of Respondent's office and three persons in construction trades other than iron worker were convicted after quilty pleas to violating Minnesota law prohibiting riot.

The animosity of unionized building trades to BE&K was fully documented. Presentation was in keeping with common knowledge in labor relations of the institutional view held by AFL-CIO affiliates toward "merit shop"—termed nonunion contractors. Here evidence was presented that as early as March 1988 the United Brotherhood of Carpenters and the United Paperworkers International Union announced their formation of a joint

"Solidarity Committee." A news release described their intention to carry out "programs in the forest products industry" with particular reference to a "BE&K Alert" relative to this company's asserted "policy to undercut union construction standards in papermill construction projects." This one-sheet release was a harbinger of further reams showing the virulent hostility of building trades unions to the growing nonunion phenomenon in construction, and to BE&K in particular. Suffice it that such material showed an extreme depth of concern, national in scope of publicity and with brooding encouragement of the fullest sort of personal, community, and political pressures to counteract this threat against union labor.

As to the specific expansion project at International Falls this objective manifested with involvement by Minnesota's governor in the dispute, and litigation against numerous parties seeking to establish that a unionized basis for the project must exist because of legally enforceable dealings between Boise Cascade, Fru-Con and the AFL-CIO unions of Minnesota. The violent disruption at BE&K's personnel office on August 28 had occurred principally from action by a bus load of unionists arranged for by officers of Pipe Fitters Local 728 located in Iron Mountain. Admittedly, too, the extent and frequency of cross-communication between key union functionaries, Peterson, Salo and LaVallee included, escalated as the seeming crisis of BE&K successfully verging on eventual project completion at the Boise Cascade expansion grew ever more realistic.

D. RESPECTIVE CONTENTIONS

1. As Made at Trial

General Counsel's opening statement succinctly outlined the project's background, and set forth a goal of proof showing how Respondent "arranged transportation for its members and for others" in connection with the riot.

Charging Party's counsel enlarged on case theory by terming the riot both "planned" by Respondent's "covert" undertakings, and so shown by the "circumstantial evidence" to be adduced. In later colloquy Charging Party's counsel stated, "our case is built on the activities and the interrelationship of these various unions . . ." (Tr. 424).

Initital comment by Respondent's counsel referred to the historically important source of employment in Michigan's upper peninsula that papermill construction comprised, but from this contrasted his client's total lack of any relationship with either Boise Cascade or BE&K in arguing that any "spontaneous" nature of the occurrence on September 9 "was in no way advocated, supported, urged or financed by the Respondent."

2. As Made in Briefs

In his brief Counsel for the General Counsel contends how several components of circumstantial evidence in the case show that the bus load of members traveling from International Falls for arrival early on September 9 was an "official function" of Respondent. Chief among these components was an overwrought fear of successful nonunion contracting, coupled with a configuration of telephoning that would "strongly suggest" the claimed bus arrangements were in fact made by Respondent.

In its brief BE&K advances three theories of violation from the solely circumstantial evidence in the case. It first contends that Respondent "instigated, planned and participated" in the riot, secondly that even if not so doing it subsequently ratified the riotous conduct, and that, thirdly, its members' "mass action" made Respondent liable for the consequences.

Respondent's post hearing brief disputes that circumstantial evidence, particularly the frequency of telephone calls among interested union functionaries, affords a "proper basis" for an inference that they were planning a riot. The brief further contends that the "vast quantity" of data totally fails to establish the claimed planning of, or participation in, what eventuated as the man-camp riot. Generally Respondent's brief is in harmony with its often-repeated statement during trial that documentary evidence, including telephone records, are without "relevance, materiality or other circumstances affecting the probative value" of such items as were admitted.

E. FACTUAL HIGHLIGHTS OF THE CASE

On July 24 LaVallee composed a letter on Respondent's stationery which secretary Anderson typed. The letter was addressed to members and signed by LaVallee. It stated:

> The Boise Cascade Paper Company of International Falls, Minnesota, has selected BE&K as its Construction Manager and General Contractor to build a 535 million dollar paper facility on a Merit Shop Basis. BE&K advised the Iron Range Building Trades Council that no more than 50% of the job would be subcontracted Union and in fact is performing Iron Work and other Trades work on the project on a nonunion basis.

Based on these circumstances and the fact that BE&K is importing non-union workers from the South, the Union Tradesman on the project have chosen not to work side-by-side with these non-union workers and are presently off the project and demonstrating against BE&K and the owner over their choice of importing non-union labor for the project.

Local Union #563, Duluth, Minnesota needs our help, both financially and assisting in demonstrating their right not to work side-by-side with non-union workers.

As Brother Iron Workers, we are asking you for a $10.00 per week voluntary contribution to assist their efforts.

Please donate this contribution to your foreman on a weekly basis until notified otherwise.

Thank you for your support.

Before issuing this letter as an item of regular union mail LaVallee first obtained legal advice. When it developed that the July 18 walkout at International Falls had not been officially sanctioned, LaVallee did not send the letter out as planned. However it soon became known that a copy was circulating among iron workers at the Quinnesec job, and learned even later that the contants had been printed in a Minnesota newspaper. I do not determine from any known facts whether contributions passed through Respondent's office as a result of this letter being leaked; rather the entire murky matter of banded cash amounts that *may or may not* have been responsive is used as a factor in credibility evaluations to be made below.

Donald Dabb individually owns and operates a charter bus service from his home in Aurora, Wisconsin using the

business name Northland Coaches. He is assisted by his wife and son, who particularly cover the telephone when Dabb himself is away as the principal driver for his business. Aurora is only a few miles from Iron Mountain across the state line, and Dabb was the provider of round trip transportation for the charter arranged by Pipe Fitters Local 728 when its members traveled to International Falls and engaged in the personnel office disturbance of August 28.

Dabb testifed that he had never dealt with a person named LaVallee until last summer 1989, when a caller giving that name telephoned to make preliminary inquiry about the chartering of a bus for travel to Minnesota. According to Dabb he estimated the cost of such a trip, but the LaVallee person simply never called back and he assumed such plans were canceled.

However Dabb did schedule and fulfill the chartered trip of September 8-9. He recalled this commitment originating by telephone from a male-voiced caller who identified himself as "concerned persons" interested in an Iron Mountain-International Falls round trip. Dabb gave this price, advised that advance payment would be necessary, and agreed to start the trip at a bar in Iron Mountain named Dad's Place. This establishment was, or had been, owned by the same Dan Miller later to be convicted of riot at International Falls. Dabb commenced the trip on schedule with 36 passengers after finding cash payment in the bus. One of the travelers said only that it had been left by "Dean." The 7 p.m. departure on September 8, was made and Dabb proceeded uneventfully through the night to International Falls after one stop for a single passenger pickup at Iron River, Michigan. He did have very brief, and from his standpoint reluctant, conversation with Miller during the drive.

After his bus emptied in International Falls at approximately 3 a.m., Dabb told the travelers he would look for a local motel to sleep and that they should call him when the return travel was ready to be started.

He was called in late morning by a person saying the group was ready to leave, and "wanted to get out of town." Before leaving his motel Dabb had a brief discussion with a sheriff's officer, the conversation amounting to the officer learning that Dabb was about to drive back and Dabb learning that there had been "some problems" at the locality. He made the intended return pickup of passengers at the Viking Bar, and commenced the intended return just before noon after loading of passengers proceeded promptly. Before clearing International Falls, however, Dabb was stopped by police and his bus escorted to the city's Law Enforcement Center for the disembarking consequences described above.

Immediately after Dabb's return to his home in Aurora another charter trip manifested for him to again travel to International Falls. Dabb testified that this arose by telephone contact from the "concerned persons" caller, and in consequence he left at 3 a.m. on Monday, September 11, to pick up the individuals that had been jailed following their arrests at the bus. When Dabb arrived at the International Falls Law Enforcement Center later that morning he learned that in fact no one was yet released for transport back to Michigan. He waited there for several hours until finally told by the local prosecuting attorney that no releases were imminent. At this point Dabb, and the accompanying friend who helped him drive on long distance turnaround trips, went to Virginia, Minnesota south of International Falls. They remained there at a Holiday Inn while waiting for more instructions, after notifying the Dabb home/office of

their whereabouts. They actually stayed at this Holiday Inn for the nights of both September 11 and 12, and then returned when the entire commissioned charter proved futile. This result seemed plain after Dabb's wife called him to say that "concerned persons" had telephoned her saying there should be no further waiting for the people in jail. Dabb testified that his overall charge would have been $1,350, and none of this amount was ever paid.

According to both Perry and LaVallee they began receiving frequent inquiries from worried friends and family about the union members being held in Minnesota following the riot. Perry's reaction to all this was relatively limited, however LaVallee undertook major relief efforts. His immediate action was to travel to Duluth, and with that as a base of operations undertake legal and financial steps to aid his arrested union members. He spent almost a week in Minnesota, during which time he arranged through his Marquette bank for a $30,000 loan with a wire transfer of the funds to Minnesota. This loan was nominally made on LaValle's personal credit, and approval was based on his telephone request by bank functionaries long familiar with LaVallee as the business holder of his union's several accounts. From his hotel base in Duluth, he made one or more trips up to International Falls, where he engaged attorney Steve Nelson to provide legal representation for numerous arrested persons plus paying out $16,000 in bail amounts from the wired loan proceeds and a lesser amount in fines. LaVallee did not return from Duluth until September 15, at which point the riot consequences were settling out in terms of the various persons who were to await fulfillment of criminal proceedings stemming from offenses that were committed. Bank records establish

that the loan, accounting also for interest and fees, was repaid in three installments. The first repayment was a $12,000 amount toward principal on October 2, and about a month later two further payments liquidated all that had been borrowed. LaVallee testified that money contributions began arriving in late September into early October from the Quinnesec job, terming his assumption of this happening as being that "people were aware of the obligation that I had undertaken to post bail. . . ."

In specific regard to telephone records that might implicate Respondent in at least the chartering of Northland Coaches for the September 9 trip, there are twelve such calls that bear close attention. Using as reference points the telephone numbers: (906) 228-6450(51), (906) 343-6650 and (715) 589-4145 for Respondent's Marquette office, LaVallee's residence in nearby Sand River, Michigan and Northland Coaches at Aurora, Wisconsin, respectively, the following telephoning is shown:[2]

Date	*Time*	*Duration (Minutes)*	*From*	*To*
Sept. 1	9:36 a.m.	2	(906) 228-6450	(715) 589-4145
"	9:42 a.m.	1	"	"
"	6:04 p.m.	1	(715) 589-4145	(906) 343-6550
"	7:15 p.m.	7	(906) 343-6550	(715) 589-4145
Sept. 2	11:00 a.m.	1	(906) 228-6450	"
Sept. 6	1:10 p.m.	1	"	"
"	6:32 p.m.	1	(715) 589-4145	(906) 343-6550
Sept. 7	8:34 a.m.	1	"	(906) 228-6450
"	6:46 p.m.	2	(906) 228-6450	(715) 589-4145
Sept. 8	8:03 a.m.	3	(715) 589-4145	(906) 228-6450
"	9:33 a.m.	1	"	"
"	10:43 a.m.	4	(906) 228-6450	(715) 589-4145

[2] A time zone change separates the Marquette vicinity (Eastern) from points in Minnesota or Wisconsin (Central). Times shown

[footnote continued]

After occurrence of the riot there was apparent telephone communications between Respondent and Dabb at 1:10 p.m. on September 11. Respondent's office received a call from International Falls then, being at about the time Dabb despaired of making the jail pickup as expected. Later at 3:30 p.m. on September 11 another call was made to Respondent's office from the Holiday Inn at Virginia, Minnesota where Dabb had commenced his waiting. A call on September 12 from Duluth to the Holiday Inn at 8:01 a.m., followed a call to LaVallee at Duluth at 7:25 a.m. from his Marquette office. The next day at 9:45 a.m. another call from Duluth to the Holiday Inn at Virginia was made, this being just before Dabb left the area. LaVallee could not recall making either of the two Duluth-originating calls over this September 12-13 period.

F. CREDIBILITY

1. Introduction

As a case uniquely based on circumstantial evidence the ordinary conflicts of testimony are not present. Furthermore the question regarding witnesses of Respondent, or those in likely sympathy with its position, is one of whether the descriptive, connective and episodal self-servingness of what is testified to seems genuine as opposed to contrived.

With that opening comment I first deal with two witness groups, one being those for whom no reason exists to doubt their renditions, and the second being those brief witnesses whose calling was tactical (or tech-

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from the telephone record excerpts are in terms of the time zone at the originating point of the call.

nical) by the party exercising subpoena powers. I thus fully credit the testimony of Robert Anderson, Boise Cascade's public affairs manager, Police Captain Randy Borden, Gary Martin, BE&K's resident project manager at International Falls, John McGriff, BE&K's personnel manager, and Eric Dufford, Vance International's former tactical security cameraman at the man-camp. I exclude as an unnecessary exercise any credibility evaluation of Kevin Nylund, Keith Halverson and Ralph Guentzel, who each essentially denied the possession of subpoenaed documents,[3] of Michael Edens, whose brief testimony was inconsequential, and of Donald Doolittle who, with active representation by private counsel, maintained a Fifth Amendment privilege not to testify.

2. Donald Dabb

This witness was vague, halting and repeatedly voiced lack of knowledge as to matters questioned about, a presentation that left few subjects of evidentiary weight. There are two additional twists to consider; first that Dabb would reasonably have, and faintly gave just such a hint of, the inclination to protect interests of organized labor in his vicinity, and secondly that he repeatedly alluded to a hearing impairment which affected both conversation and his ability to comprehend tonal qualities between voices. Furthermore, as a mixed matter of credibility and case analysis, his family-style bus charter business was subject to various forms of communications

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[3]Halverson was one of the 21 named defendants in Charging Party's civil action filed with Koochiching County (Minnesota) District Court as Case No. 36-C-89-201. Guentzel, a member of Respondent, was one of the 59 persons convicted of riot in the criminal courts of that county, although he was not on Dabb's bus at the attempted start of a return trip on September 9.

success by those placing telephone calls to it. A telephone answering machine was in use, and Dabb at one point referred to more than one son that a caller "could have reached" (Tr. 213). The single phone number at the home for personal and business purposes combined leaves concern for just how accurately Dabb could reconstruct past happenings even if highly sincere by capacity and intent. I leave his peculiar situation as a credibility assessment that by demeanor and probability his testimony is of little value. While not doubting its general correctness as to tangible matters of place, time and distance, I subordinate Dabb's recollection to that of LaVallee where they are in disharmony. Charging Party's particular point about Dabb's possible financial interest in the case outcome has been considered in making this evaluation.

3. Beatrice Anderson

This witness presented with an impressively honest-seeming demeanor and after taking into account her obvious self-interest as a longtime office employee of Respondent I credit her in full. The effect of this assessment is, somewhat as the case with Dabb, to subordinate her less vivid recollection of internal office matters and financial details to that of LaVallee.

I do also note that Charging Party overreaches in its brief with footnote 24, page 12, in writing that Beatrice Anderson testified in her deposition of February 21, 1990 that cash collections were received at Respondent's office "*as a result*" of LaVallee's July 24 letter (emphasis supplied). Beatrice Anderson's deposition falls far short of supporting this phrasing. She was first asked about whether money came in to Local 783 "as a result of this letter?" at deposition page 66, to which she answered "Well, we did get some." In an immediate followup

question she vacillated with "Yes, we did, but I can't–I don't know." In subsequent deposition questioning about whether cash contributions followed from LaVallee's letter her answers included "I–yeh, I can't–I don't know. I don't know that, about time, I–I couldn't answer that (page 68, 11. 6-7), "I–I don't know that" (page 71, 1. 13), "I don't know" (page 73, 1. 25), and "No, I can't–I can't say that, because I don't know what–at what times or specific dates that any collections came to the office" (page 74, 11. 5-7).[4] The upshot of this overreaching in making Charging Party's argument is to further buttress a belief in the underlying, simple sincerity of persons associated with Respondent, as they were taken through a sweeping attempt at reconstruction of myriad events from the past.

4. John LaVallee

a. Summary Belief

In the face of a painstakingly-mounted collection of circumstantial evidence, the general and specific veracity of this key individual is largely controlling of the decision. After full reflection on all factors seeming, or claimed, to touch on a credibility evaluation, I accord near-total acceptance of LaVallee's testimony.

b. Demeanor

LaVallee was most importantly seen in his testifying role on the final day of trial. Although earlier and adversely called by Charging Party, and present during the

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[4]During this line of questioning participating Attorney Green, echoing Attorney Casselman, interposed a tacit objection that the witness was being repeatedly subjected to improper leading questions.

entire hearing, LaVallee's most important offerings came when called as Respondent's chief defense witness. In the course of such modestly extensive examination I was impressed with a consistent and valid-seeming candor in practically all that he had to relate. In the realm of purely subjective reaction to the demeanor of another, I reach the fully positive conviction that his distinctions of fact and perception presented a comfortable assurance of truth-telling. Given the complexities of subject matter about which questioned, he displayed a remarkedly high degree of consistency in his many instances of several times answering.

c. Testing Instances

Aside from the pure demeanor of LaVallee's testimonial appearance, there were several areas in which the veracity of what he recalled was lifted to even higher prominence because of surrounding circumstances. These are largely drawn from a comparison between his testimony at trial and the two-part deposition given by LaVallee in December following the events, particularly Volume II thereof. As to Volume II the passage at pages 98-107 does much to cause disbelief that LaVallee has created only an "alibi"[5] to avoid enmeshing his organization in liability for the riot. This passage shows quite vividly the scope and subject matter of LaVallee's numerous occupational activities, and more importantly the diversity of his contacts. I consider well the internal (and fraternal) union, collective bargaining, community, public relations/publicity, institutional and technical sweep of his working hours, and from that whether it should be reasoned that because of several telephone

[5] A term attributed to General Counsel, as used in his brief at pages 14 and 15.

calls that Dabb's Northland Coaches enterprise in homey Aurora, Wisconsin received it must have been part of a clandestine bus-renting scheme. Upon so considering this point, I believe the requested inference is not an appealing one to make.

In Volume II of the deposition at pages 57-67 LaVallee was questioned exhaustively about a certain check No. 13301 drawn on Respondent's account for $1,250, and taken as cash with a bookkeeping notation of only "LU." His explanation stated that his money was simply turned over to a small contractor of the vicinity, who had been squeezed off a job by the dynamics of other interests jockeying for favored position. However unsavory this might seem in the abstract the point is that LaVallee candidly described the reasons, named all persons and organizations with any knowledge of such dealings, convincingly explained how this odd transaction fit in with construction industry unioneering and generally revealed "chapter and verse" about the entire matter. This was coupled with a prompt and predictable denial to Attorney Noteboom's question whether "any part" of this loosely handled $1,250 cash boodle had been used to pay the Northland Coaches charge to International Falls.

Another sequence of incessant and detailed questioning concerned the earlier cash-oriented transaction, when check No. 13188 for $2,500 was held for 5 weeks as office cash until redeposit on August 29. In this instance the passage covering deposition Volume II pages 15-24 reflected more fully the vagaries of how this small local union of Michigan's sparsely populated upper peninsula operated. The Charging Party's intimations and expectations did not materialize; essentially showing the poverty of its theory that so much of LaVallee's manner of operating was artificial.

In general as to financial affairs LaVallee explained repeatedly that union trustees regularly approved his monthly financial reports, and this explanation was not assailed in any known manner by the deposing party in interest. Perhaps the best instance of these validating examples concerning the solid-seeming veracity of LaVallee's responsiveness was seen in his winsome concession made at deposition Volume II page 50 that "The system we used might be kind of crude, but we got a cash box down there, and that's accounted for." Finally, in an engaging turnaround LaVallee piqued his questioner as to an actual instance of faulted itinerary plans and the capricious vagaries that attend on persons in busy careers of either labor officials *or* law practitioners (deposition Volume II, page 30, 11. 3-4).

d. Privilege Taking

The Charging Party's brief at continued footnote 24, page 13, faults LaVallee for refusing to answer certain questions regarding post-riot fund collections and disbursements on Fifth Amendment grounds. I duck any attempt at an academic exposition of whether such fundamental privilege taking may support an inference adverse to the party exercising this constitutional right. Suffice it instead that in the context and time frame here such privilege taking done during both December depositions occurred after cautious and well-articulated reasons for doing so, first by attorney Green and later by attorney Casselman. Considering the magnitude of the riot episode, the various criminal charges arising therefrom, the widely-dispersed geographic origin of participants, and the non-unraveled manner of financing the large assemblage of early hours on September 9, the caution displayed by LaVallee's counsel (attorney Green dis-

tinguishing his role specially as between private counsel and union counsel) was not untoward. On this basis I reject any slant or intimation that is being suggested for a lessening of LaVallee's credibility standing because he took the Fifth.

e. Consequences of this Assessment

The conglomerate effect of this credibility evaluation is both that I accept LaVallee's basic denial that (1) he had any active role in chartering Dabb's bus for September 9, (2) that he at any time used the pseudonym "concerned persons," and (3) that he funnelled any cash amounts used to defray or bear the cost of Northland Coaches' intended round trip bus transporation for 36 passengers drawn primary from Respondent's craft membership. There remains however the independent and important issue of whether total circumstantial evidence supports what is alleged in General Counsel's complaint, and that topic is treated next.

G. Discussion

Aside from it being a matter of public notoriety the Board is specifically experienced in labor-management strategies based on the growth of open shop construction industry contractors. In *J. E. Merit Constructors, Inc.*, 302 NLRB No. 42 (March 29, 1991) the Board adopted description of a construction contractor which had "historically operated on a nonunion basis," this being background to a major AFL-CIO building trades local union undertaking a planned "step in its 'Fight Back Program' against several nonunion maintenance contractors operating within its territorial jurisdiction." The parallels of this phrasing to background here is a plain instance of the pervasive tension that spreads across this

area of labor management relations, and the depth of feelings that can be engendered. The subject is a long-festering one. In the mid-80's AFL-CIO President Lane Kirkland criticized then-Secretary of Labor Donovan for meeting with officials of the Associated Builders and Contractors, "an organization of predominantly non-union construction firms," with rhetoric that reached a quoted crescesdo of "otherwise pander[ing] to that lousy organization of scab-herders." *Labor Relations Yearbook 1984*, Bureau of National Affairs, p. 257.

As among voluminous contextual evidence here, a relevant item in substance and timeliness to the issue is the collegially-addressed attachment to Bill Peterson's memorandum dated August 24 to "All Building Trades Councils" of Minnesota, urging a large rally turnout at the State Capitol on September 16. The two-page attachment was a partisan condensation of background to the frustrating International Falls developments, and the gave reasons that a practically treacherous combination of political and business forces was threatening the "prevailing wage" justifiably deserved by "our skilled brothers and sisters" which warranted a concerted rendering of "labor's voice . . . about the Boise Cascade situation...

I use this item of documentary evidence as a point of departure for discussion, because LaVallee's version of his late summer activities keys strongly to the message. It was this very rally at St. Paul, Minnesota on September 16 that he testified was the topic of a remembered six or so telephone calls to Northland Coaches in preliminary exploration of whether and by what details a bus charter for his members to St. Paul might be arranged.

In essential rejection of the contentions by General Counsel and Charging Party, I hold that from all material circumstantial evidence LaVallee had in truth

explored this project. The trail of telephone records is as supportable of that proposition as that he was really covertly engaged in plans to participate with other components of upper Great Lakes organized labor in destructive rioting activity at the man-camp, using such of his willing members as would voluntarily engage in this violent activity.

I have found that Dabb's testimony is without value as to analyzing this issue, for I specifically discredit his failure to recall more than one contact or attempted contact running either to or from him as regards Respondent's office on the rally chartering prospects for September 16. Both ends of such contact have a built-in vagueness to them; on LaVallee's part because of his great amount and diversity of business telephoning and on Dabb's part because his family-assisted, residence-based business leaves simply too much random uncertainty about telephone contacts made to it or attemptedly so. Thus I characterize the twelve recorded telephone contacts made or attempted between Dabb's location and LaVallee, either at his home or office, as insufficient to contribute that much of a showing toward an agent of Respondent being the secretive "concerned persons."

A close examination of the specific days, the several times of day, and the recorded duration of calls, suggests quite strongly that no more than six *effective* calls were made as LaVallee had credibly testified. I discount the seven 1-minute calls of September 1 (2), September 2, September 6 (2), September 7, and September 8 as inconclusive telephoning attempts that did not reach the intended callee, or that were absorbed into a message answering machine. I do so both because of the inherent unlikelihood that discussion of the type intimated would

have taken place in the short 1-minute span, and more persuasively that in *each case but one* of a 1-minute call (or set of 1-minute calls) a more substantial telephone contact shows from the records later that same day or early the following morning. The exception applies to the call of September 2 at 11 a.m., one which was not repeated until September 6 at 1:10 p.m. However I note that these were both calls *from* the structured office setting of Respondent at Marquette, and to the less structured Northland Coaches enterprise at a family domicile in small town Wisconsin. Further it is seen that these calls were made on a Saturday and a Wednesday, respectively, leaving not unimaginable that LaVallee carried an intention to inquire of Northland Coaches as more time for response from his members could materialize.[6]

Notably there is another variable in the picture; that of whether some person familiar with Respondent's office, and to its functionaries, surreptitiously used the outgoing office number 228-6450 at some point before the bus trip. Respondent's telephone was not a fully secure instrument, as seen from the aggregate of physical description made in Beatrice Anderson's deposition, and the passage in LaVallee's deposition Volume II, page 89 where he stated how even an "apprentice instructor" might have access.

I do express a troubled outlook as to the twelfth and final call from Respondent's office, and presumably from LaVallee himself by his own version of what was then

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[6]My crediting of LaVallee includes the point that he advised members at their general meeting of the coming September 16 labor rally in Minnesota and asked for a show of interest. The fact that meeting minutes do not cover this subject is noted, but I find this insufficient to counteract the greater likelihood.

afoot, to the Northland Coaches' number. This contact, one of at least 4 minutes duration, was made a scant 8 hours before Dabb was to depart from nearby (to him) Dad's Bar, and there is a natural temptation to believe the timing is so suspect as to tumble down LaVallee's "alibi." I cannot however close the circle on such an inference because of all other factors written about above. What I see here instead is a roughly outlined scenario which is fully as likely as the one on which allegations of the complaint are premised. The drum-beating against BE&K had been loud and long over the many months of 1989. The Quinnesec project was populated with well paid, fully to be employed until December iron workers, many of whom were working out of home Local 563 and more concernedly associated to the International Falls problem. The recent bus trip sponsored only 10 days earlier by locality pipe fitters Local 728 could not have gone without extensive knowledge throughout the Iron Mountain community including the Quinnesec jobsite. These factors were all sufficient in the aggregate to cause any manner and combination of persons to independently plan a counterpart trip, particularly where the situation at International Falls itself was experiencing the dim but growing rumor there that some watershed event would take place at BE&K's man-camp on September 9.

The evidence settles into a mere state of equilibrium. It would require pure conjecture to tip the scale, primary by *assuming* what the content of numerous telephone calls, ostensibly between an agent of Respondent and Northland Coaches, had been. There are various possibilities, if not probabilities, as to such content. Thus, any conjecturing has no solid basis in evidence to choose one likelihood over another. It is a matter of whether to say what "could have been" rather that what "must have

been." I have insufficient basis to say that applicable content *must have* covered impermissible subjects, rather than that it only *could have* so consisted.

I have also considered the upsurge in cross-telephoning between LaVallee and counterpart or interested union functionaries after both the July walkout and the August 28 personnel office disturbance. While of legitimate note I do not attach enough significance to any of this type activity as would vary my fundamental holding. This view also includes an appraisal of LaVallee's July 24 letter as merely his ideated response in support of the tactically-doomed walkout of union members at the International Falls project. The fact that this letter received dissemination after being officially squelched is not a matter of seeming significance to the issue, and I generally view this facet of the evidence as revealing more of background sentiments than of materiality to the crucial issue of agency.

It would be naive to flatly assert that all is known about the eventful summer of 1989. This is particularly true notwithstanding what else I have said about LaVallee's veracity, concerning whether or not he had some foreknowledge that Local 783 members were about to board a bus for some demonstration of union solidarity at International Falls based on their collective planning. As generally commented about before, the intimated interplay of telephone calls and LaVallee's interdicted letter of July 24 exemplify how suspicion might at least be harbored. A comparable reaction is felt for example as to the uncommonly busy telephoning among what Charging Party terms "key players," that is the principal union activists in Minnesota, International Falls on July 26 and 27, but how can these loose ends tie up into some coherent and compelling conclusion binding Re-

spondent? I do not believe they do, nor as applicable to LaVallee's telephoning the International Union on August 29 and twice on September 8, after so few instances of this in immediately preceding periods.

It is in the nature of things that any focus of attention can fluctuate depending on how the world turns. If Respondent's focus in early summer 1989 disclosed numerous telephone calls to Tipp City, Ohio and Eagle River, Wisconsin (Exhibit JX-14), why is it so intriguingly significant that later this sort of focus swung to International Falls, Minnesota and Aurora, Wisconsin? I believe it is understandable to have such shifting attentions, and while I have earnestly reflected on the circumstantial bases of all the evidence that has been marshalled against Respondent I do not believe that it legitimately requires or permits the requested inferences. The issue of this case lent itself from the beginning to a direct opinion as to the cumulative and potentially interconnected significance of all circumstances arising out of the waking hours of many people. In sum I conclude that the evidence as a whole does not support the fundamental allegation of the complaint.

After committing to this overall view of the pre-riot evidence I turn to what both General Counsel and Charging Party contend respecting post-riot happenings. Here I believe these contentions are simply unavailing, for LaVallee's quick and extensive action of that following week seems keyed only to "damage control" regarding the jam in which his members found themselves. While also troubled by a chink in LaVallee's seemingly high veracity by failure to recollect telephoning to Northland Coaches from his Duluth base early in the week following the riot, I do not believe the irregularity suffices to support a claimed unfair labor practice. The activity

was over at this point in time and a bus chartering was simply related to how a detained group of persons might be transported back to their Michigan locations some 400 miles distant. Furthermore Respondent has made no secret of an early contact to Northland Coaches, for Perry described this happening as early as the evening of September 10. The details of this contact and its reasons as perceived by Perry are set forth at his deposition pages 71-74 (Exhibit JX-40). Considering that Perry and LaVallee was apprised of this potential for transportation and among other things picked up on the prospect although not now recalling having done so.

LaVallee was also urgently involved early that post-riot week with the funding of bail and legal expense money for those he wished to assist. Here the focus of the case has been on his motivation in obtaining the $30,000 loan; my view is to propose that the banking practices too should be looked at. LaVallee's motivation was merely a part of his post-riot undertakings, an activity I will write about below in terms of the "condonation" theory faced by Respondent. However the banking decisions also reflect somewhat on the circumstantial import of this case, for if the bank could trust LaVallee on the most informal of loan applications then I see no reason why his confidence in voluntary contributions from union members should not also eventuate. When deposed by BE&K on January 4, 1990 in its civil lawsuit, senior bank vice president Michael Dunn stated that he approved the $30,000 loan on a short-term basis but *informally* because of "time constraints," after taking into account LaVallee's *verbal* assurance that he would pledge his residence in collateral should a longer term be needed before repayment. This largess must have been welcome, but is more a reflection of the business influ-

ence wielded by LaVallee in his home Marquette area than of sound banking practices. Essentially $30,000 was wired off from Michigan based on a telephone call from LaVallee in Minnesota that he needed such an amount as a *personal loan* not to be accountable for by his organization in its formal sense. The ready accommodating of LaVallee was, of course, expectably justified, when only several weeks later he made cash payment of over one-third the total amount to bank operations manager Sue Johnson (deposed simultaneously with Dunn and others) while making the intimation that such proceeds occurred because "they passed the hat." The significance of all this to the case is that post-riot funding was first, last and foremost a fraternal phenomenon among all involved in fulfillment of tacit expectations based on shared union percepts.

Having not seen from the overall evidence the establishment of an agency connection to Respondent respecting the riot, I do not reach General Councsel's and Charging Party's contentions respecting Respondent's claimed instigation, planning and participation in the riot. For this reason I do not treat the main doctrine of agency, and also do not reach for discussion cases such as *Int'l. Longshoremens and Warehousemen's Union, Local 6 (Sunset Line and Twine Co)*, 79 NLRB 1487 (1948), *Plumbers, Local Union No. 195*, 233 NLRB 1087 (1977), *Avis-Rent-A-Car System*, 280 NLRB 580 (1986) and *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82 (1988) on which the doctrine is based. General Counsel and Charging Party however advance two further theories in support of the complaint, one of condonation and one of "mass action" by union members.

Respondent faces a specific contention that it condoned the riotous conduct, by not disciplining its involved members as empowered to do. It is not realistic to expect that Respondent would impose discipline within the meaning of its organizational authority. While not openly praising the rioters' conduct, the activity was not inimicable to trade union objectives in the Boise Cascade dispute. In terms of the International Union's constitution, 10 of the 11 enumerated grounds for "charges" against a union member are not remotely relevant. Number 10 considers an offense to be any act "likely . . . to bring discredit" on the union, or to produce any "derogatory" result. In a realistic sense this item is a dead letter insofar as any Local 783 member perhaps being charged. Regardless of verbiage it would certainly be against the spirit of the union's constitution and its objectives. Furthermore, the errant members were in the clutches of the criminal justice system, and Respondent's essential role after September 9 was to deal with them as needful strandees. I reject the condonation theory on the basis that it does not square with typical reasons for intra-union member discipline, and does not have a context close to the Respondent's field of geographic influence as typically so in condonation cases. Because I do not consider Respondent's post-riot acts of assistance as condonation, nor do I believe it had standing to effect discipline within the meaning of that concept in labor organization affairs, I also neither treat cases such as *East Texas Motor Freight*, 262 NLRB 868 (1982), *General Teamsters, Local 326 (Eazor Express, Inc.)*, 208 NLRB 666 (1974), *International Brotherhood of Boilermakers, Local 1*, 297 NLRB No. 75 (December 29, 1989), and *Local 248, Meat & Allied Food Workers*, 222 NLRB 1023 (1976). All of these cases involve picketing

activity by the union members involved, a far and distinguishable cry from even not unspontaneous destructive conduct by persons acting 400 miles distant outside the jurisdiction of the labor organization being charged, and subjecting themselves to specific criminal and civil liability in the process.

Finally the "mass action theory of Charging Party is reached, but again this is merged into notions of condonation which I hold inapplicable to the proceeding. Beyond this, and more importantly, I do not believe the "mass action" doctrine is fundamentally applicable to this case by its nature based uniquely on circumstantial evidence.

Food & Commercial Workers Furriers Counsel, 280 NLRB 922 (1986), cited by Charging Party, is simply not in point, while *Tri-State Building Trades Council (Backman Sheet Metal*, 272 NLRB 8 (1984) is a fact-intensive case unsuitable as authority to support the defined "mass actions theory of liability for group action alone. *Burgreen Contracting Co.*, 195 NLRB 1067 (1972) was a case of "mass picketing [around] mine property entrances" with union "responsibility" based largely on (1) presence at, in roles of spokesman, each mine site of presidents of a union affiliate, and (2) substantial evidence that union agents "were intimately involved in the orchestrated arrivals and departures of the pickets at each of the five mine properties . . ." *Sheet Metal Workers, Local 28*, 196 NLRB 1065 (1972) involved union responsibility based on "the inescapable inference" that it "approved and ratified the work stoppages [and] actually participated in them." *Teamsters Local 85 (San Francisco Newspaper Printing Company)* 191 NLRB 107 (1971) fundamentally turned on "signs" evidencing union support for unlawful picketing.

In *Consolidation Coal Co.*, 709 F.2d 882 (4th Cir. 1983) the court traced origin of the "mass action" theory from *Carbon Fuel Company v. UMWA*, 444 U.S. 212 (1979); 500 F.2d 750 (2nd Cir. 1975) and found, in its case, that "mass action" was "establishe[d]" because not only members but "all officers" of a defendant local union "participated in the work stoppage." I find the *Burgreen Sheet Metal Workers, Teamsters Local 85* and *Consolidation Coal Co.* cases above fully distinguishable from this fact situation, and reject their applicability. Even *Eazor*, supra, was a timid presentation of the theory, for the passage of *Eazor* from the Court of Appeals quoted in Charging Party's brief *followed* a reference to the "so-called" mass action theory about which, without holding it as a well-defined doctrine, the court only noted that "many courts" had held unions responsible. See *Eazor v. Teamsters*, 520 F.2d 951, 963 (3rd Cir. 1975). In summary, I reject the mass action theory as having application to this case.

CONCLUSIONS OF LAW

1. BE&K Construction Company is an employer engaged in commerce within the meaning of Section 2(2)(6) and (7) of the Act.

2. Iron Workers Local 783, International Assocation of Bridge, Structural and Ornamental Iron Workers, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent labor organization did not engage in unfair labor practices as alleged.

DISPOSITION

On the foregoing findings of fact and conclusions of law and the entire record I make the following recommendation:[7]

ORDER

The complaint is dismissed in its entirety.

Dated: April 29, 1992

/s/ David G. Heilbrun
David G. Heilbrun
Administrative Law Judge

[7] **If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.**

(3)

Supreme Court, U.S.
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No. 94-458

In the Supreme Court of the United States

OCTOBER TERM, 1994

LOCAL 783, BRIDGE STRUCTURAL & ORNAMENTAL IRON WORKERS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

FREDERICK L. FEINSTEIN
General Counsel

LINDA SHER
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board
Washington, D.C. 20570

16 pp

QUESTION PRESENTED

Whether the court of appeals erred in finding that petitioner violated Section 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(A), by ratifying and condoning acts of violence committed by its members and affiliates.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 23 F.3d 1459. The decision and order of the National Labor Relations Board (Pet. App. B1-B4), and the decision and recommended order of the administrative law judge (Co. Br. App. 1a-37a)[1] are reported at 311 N.L.R.B. 734.

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[1] "Co. Br. App." refers to the appendix to the brief in opposition filed in this Court by respondent BE&K Construction Company.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 1994. On August 9, 1994, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including September 11, 1994. The petition for a writ of certiorari was filed on September 12, 1994 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In March 1989, Boise Cascade Corporation selected BE&K Construction Company, a non-union firm, to serve as construction manager and general contractor on a $500 million expansion project at its paper mill in International Falls, Minnesota. Pet. App. A7. The building trades unions had unsuccessfully sought to secure the selection of a unionized general contractor on the Boise Cascade project, and they harbored great hostility against BE&K. *Id.* at A9. Construction work on the Boise Cascade project began in early July 1989, with a work force consisting of BE&K's non-union employees and employees of both union and non-union subcontractors, but on July 18, 1989, the unionized employees walked off the job and engaged in disruptive picketing to protest against BE&K and the non-union subcontractors. BE&K responded by hiring non-union firms to replace those unionized subcontractors whose employees had participated in the walkout. Co. Br. App. 3a, 6a-7a.

Petitioner's headquarters are located in Marquette, Michigan, about 400 miles from International Falls. Its jurisdiction covers Michigan's upper peninsula. Co. Br. App. 3a, 4a. On July 24, 1989, shortly after the walkout at the Boise Cascade site, John LaVallee, petitioner's business manager, financial secretary, and treasurer,

drafted a letter advising the membership that a Minnesota local "needs our help, both financially and assisting in demonstrating their right not to work side-by-side with non-union workers." *Id.* at 12a-13a. LaVallee did not mail the letter, but a copy of it found its way into circulation among iron workers, including members of petitioner, who were employed on a large project in Michigan. The letter was also reprinted in a Minnesota newspaper. *Id.* at 13a.

b. By early September 1989, a specialty builder hired by BE&K had completed the initial phases of an employee housing center, known as a "man-camp," located about two miles from the Boise Cascade construction site. Rumors then circulated in International Falls that a large disturbance was about to occur at the man-camp. Acting on those rumors, BE&K canceled construction work for September 9 and evacuated employees residing at the man-camp. In the early morning of September 9, about 450 persons converged on the man-camp, tore down the security fence, and rioted. They overturned vehicles, vandalized the dormitories and their contents, set fire to buildings, and caused physical injury to security guards. The riot caused approximately $2 million in damage to the man-camp. Co. Br. App. 7a-9a.

Among the rioters was a group of individuals who had arrived in International Falls from Iron Mountain, Michigan, on a chartered bus about four hours before the riot began. Co. Br. App. 9a.[2] Those rioters attempted to leave International Falls shortly after the riot ended, but they were intercepted by local police. Of the 32

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[2] Iron Mountain, Michigan, is located about 75 miles from Marquette, Michigan, where petitioner is headquartered. Co. Br. App. 3a-4a.

passengers on the bus, 11 were members of petitioner, and 15 were on "travel" status with petitioner (that is, members of other locals who, for a service fee, had been referred by petitioner to jobs within its jurisdiction). Fourteen passengers were arrested by the police; seven of those were petitioner's members, three of whom were subsequently released by the authorities, and four of whom pleaded guilty to charges of criminal riot. Two individuals on "travel" status with petitioner also were arrested and pleaded guilty to criminal riot. Co. Br. App. 9a; Pet. App. B1 n.1, B3.

The services of the bus company for the chartered trip had been arranged over the telephone by someone identifying himself only as "concerned persons." Co. Br. App. 14a. Although Donald Dabb, the owner of the bus company, could not identify the voice of the person with whom he had spoken respecting the booking, telephone records revealed that 12 calls had been made between petitioner's office or LaVallee's residence and Dabb's office between September 1 and September 8, 1989. *Id.* at 17a. The bus trip originated at a bar owned by a former member of petitioner who pleaded guilty to criminal riot at the man-camp, and the cost of the bus charter was paid in cash by one of the passengers, identified only as "Dean," who placed an envelope containing the money on the dashboard of the bus shortly before the departure for International Falls. *Id.* at 14a.

Following the riot, LaVallee received inquiries from worried friends and family members of petitioner's jailed members. In response, LaVallee travelled to Duluth, Minnesota; from there, he obtained a $30,000 loan from a bank in Marquette, Michigan, where petitioner maintained several accounts. LaVallee offered his home as collateral for the loan. LaVallee used the loan proceeds to secure legal representation and bail and to pay fines

for petitioner's jailed members. Co. Br. App. 16a, 32a; Pet. App. A13, A19. LaVallee repaid the bank loan over the next two months from contributions made by petitioner's members. Pet. App. A13, B3 n.3.

2. a. The General Counsel of the National Labor Relations Board (Board) issued a complaint alleging that petitioner violated Section 8(b)(1)(A) of the National Labor Relations Act (Act), 29 U.S.C. 158(b)(1)(A), by participating in the September 9, 1989, riot at BE&K's man-camp. After a hearing, the administrative law judge (ALJ) concluded that the General Counsel failed to prove "an agency connection to [petitioner] respecting the riot," and dismissed the complaint. Co. Br. App. 33a, 37a. Observing that, "[i]n the face of a painstakingly-mounted collection of circumstantial evidence, the * * * veracity of [LaVallee] is largely controlling of the decision" (*id.* at 21a), the ALJ credited LaVallee's denial that he was the "concerned persons" who had arranged for Dabb to transport petitioner's members and others to International Falls on the day of the riot, and also his denial that he had used petitioner's funds to pay the bus charter fee. *Id.* at 25a.

The ALJ also found that the $30,000 loan secured by LaVallee was "a *personal loan* not to be accountable for by his organization in its formal sense," in light of the facts that LaVallee had pledged his residence as collateral, and that the loan was repaid by voluntary contributions from members. Co. Br. App. 32a-33a. The ALJ rejected the contention that petitioner condoned its members' riotous conduct by not disciplining them, reasoning that, as "the [rioters'] activity was not inimica[l] to trade union objectives in the Boise Cascade dispute," such discipline "would certainly be against the spirit of the union's constitution." *Id.* at 34a. The ALJ further found that LaVallee's post-riot assistance to

petitioner's jailed members did not amount to condonation by petitioner of their actions, for "the errant members were in the clutches of the criminal justice system, and [petitioner's] essential role after September 9 was to deal with them as needful strandees." *Ibid.*

b. The Board affirmed the ALJ's findings and conclusions, and adopted his order dismissing the complaint. Pet. App. B1-B4. The Board agreed with the ALJ that the General Counsel failed to prove that petitioner "participated in [the riot], or that it is otherwise responsible for it." *Id.* at B2. The Board added that LaVallee's "personal activities" on behalf of petitioner's jailed members did not constitute condonation or ratification by petitioner of the alleged misconduct for which they had been arrested; rather, "LaVallee merely assisted certain of [petitioner's] members to exercise a legal and constitutional right." *Id.* at B3.

3. The court of appeals reversed the Board's order and remanded the case to the Board for further proceedings. Pet. App. A1-A22. The court found that, while the "question of LaVallee's involvement before and during the arrangement for the fateful bus trip, as well as that of [petitioner] in light of the background of animosity against BE&K, is a very close one" (*id.* at A11), it was not necessary to decide whether petitioner violated Section 8(b)(1)(A) of the Act "up to and including the morning of the riot" (Pet. App. A12). Observing that "[t]he [Act] provides that the full gamut of agency principles applies when determining whether an unfair labor practice has occurred" (*id.* at A14),[3] the court

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[3] Section 2(13) of the Act, 29 U.S.C. 152(13), provides: "In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the

concluded that petitioner, "through its officers and agents, * * * ratified, condoned and adopted the unlawful conduct of many of its own members, and affiliated union ironworkers, on September 9, 1989," and that "this conduct, together with evidence of [petitioner's] involvement preceding the riot, constituted an unfair labor practice" (*id.* at A12).

Thus, contrary to the Board, the court found "strong and convincing proof in this case [that] demonstrates condonation and ratification by [petitioner] under longstanding agency principles." Pet. App. A22. The court pointed out that: (1) bank records showed that the $30,000 loan obtained by LaVallee was not a personal loan but "in practical effect was made to accommodate [petitioner]" (*id.* at A13); (2) petitioner's office secretary was instructed not to record financial contributions made by members to help "those people in Minnesota" (*id.* at A17); (3) petitioner paid for LaVallee's trip to Minnesota, "including costs of making arrangements for obtaining bail and legal representation for [petitioner's] arrested members" (*id.* at A18-A19), even though petitioner "had *no duty* to involve itself in assisting individual members in conduct of this kind" (*id.* at A20) and there was no "legal right of the arrested persons * * * to receive financial help from the union's contributions (or from the loan) for bail, legal fees or fines" (*id.* at A21-A22); and (4) neither LaVallee nor

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question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." This provision makes common-law agency principles applicable to unfair labor practice proceedings under the Act. See *Carbon Fuel Co.* v. *United Mine Workers*, 444 U.S. 212, 216-217 (1979); *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 736 & n.24 (1966).

petitioner ever disavowed "the riotous conduct even after guilt was clear and admitted" (*id.* at A20).

In addition to the foregoing evidence of ratification and condonation, the court found "evidence to indicate actual participation or instigating activity in the wrongful conduct on the part of [petitioner]." Pet. App. A20. The court cited circumstantial evidence that: (1) "the gathering of union adherents at International Falls on September 9 ([petitioner's] members * * * being in the vanguard) was obviously planned and organized"; (2) "[m]ost of those present, like the group from Iron Mountain, Michigan, came from a distance and were not International Falls people"; (3) "[t]here was long-standing hostility and animosity towards BE&K by LaVallee and his fellow union chiefs in the upper peninsula-Minnesota area"; (4) "[t]here was pervasive rumor and expectation of a 'watershed event' on September 9"; and (5) "LaVallee favored active assistance of Minnesota unions by [petitioner]." *Id.* at A21. The court declined to hold that the ALJ erred in his "somewhat ambivalent conclusions" about petitioner's actual participation in the riot, but it viewed the evidence that petitioner, "through its agent LaVallee, also actively participated or assisted in [the] violent acts against BE&K" as "buttress[ing]" its conclusion that petitioner subsequently ratified and condoned the violence. *Id.* at A22. "[T]he strong weight of all this evidence," the court concluded, "cannot be disregarded by giving credibility to LaVallee's hearing testimony and refusing to draw obvious inferences from the evidence herein discussed." *Ibid.*

ARGUMENT

The disagreement between the Board and the court of appeals in this case turns solely on whether the record

supports the conclusion that petitioner violated Section 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(A), by ratifying and condoning acts of violence and property damage committed by members and affiliates in connection with the September 9, 1989, riot at BE&K's man-camp. That issue does not merit this Court's review. Nor, contrary to petitioner's submission, does the case raise any other issue warranting this Court's intervention.

1. Section 8(b)(1)(A) of the Act, 29 U.S.C. 158(b)(1)(A), prohibits "union tactics involving violence, intimidation, and reprisal or threats thereof." *NLRB* v. *Drivers Local Union No. 639*, 362 U.S. 274, 290 (1960). It is settled that common-law agency principles, including those of ratification and condonation, apply to the determination whether a union may be held responsible for violations of the Act. *Carbon Fuel Co.* v. *United Mine Workers*, 444 U.S. 212, 216-217 (1979); *Local 1814, Int'l Longshoremen's Ass'n* v. *NLRB*, 735 F.2d 1384, 1393-1394 (D.C. Cir.), cert. denied, 469 U.S. 1072 (1984); *NLRB* v. *Miramar of California, Inc.*, 601 F.2d 422, 425 (9th Cir. 1979). The Board found here that the evidence did not establish that petitioner ratified or condoned its members' misconduct, Pet. App. B2-B3; the court of appeals, however, took a different view of the evidence, and concluded that petitioner ratified and condoned "the unlawful conduct of many of its own members, and affiliated union ironworkers." *Id.* at A12. Although the Board believes that the court of appeals should have upheld the Board's finding that petitioner did not ratify or condone the acts of violence and property damage that occurred in this case, the Board did not file a petition for a writ of certiorari because the disagreement between the Board and the court turns solely on the inferences to be drawn from the record. The court of appeals' interpretation of

the facts in this case does not warrant this Court's review. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

Petitioner is mistaken in contending (Pet. 7-8) that the Board and the court of appeals are in disagreement as to whether a union's mere provision of bail and an attorney for arrested members is sufficient to constitute ratification of the members' alleged misconduct. Rather, the Board and the court disagree on the proper inferences to be drawn from all the facts of this case, which include, but are not limited to, that legal assistance. The court found that all of petitioner's acts, taken together, required the conclusion that petitioner ratified and condoned the misconduct of its members and affiliates. Those acts also include petitioner's attempt to hide the $30,000 loan by characterizing it as a personal loan to LaVallee, although it was actually made to accommodate petitioner; petitioner's failure to keep records of contributions received from members; its payment of the costs associated with LaVallee's post-riot trip to Minnesota; and its failure to disavow the riotous conduct. All of this evidence, in the court of appeals' view, was further buttressed by the fact that petitioner had "actively participated or assisted in [the] violent acts against BE&K." Pet. App. A22.[4] Had the Board drawn the same inferences from the record in this case as the court did, the Board, too, would have held petitioner responsible for the misconduct of its members

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[4] Although the court did not overturn the Board's finding that petitioner did not violate the Act "up to and including the morning of the riot," Pet. App. A12, petitioner is incorrect in suggesting (Pet. 6-7) that the court relied only on evidence of petitioner's actions after the riot in finding that it ratified and condoned the unlawful conduct.

and affiliates. See *Local 248, Meat & Allied Food Workers*, 222 N.L.R.B. 1023, 1035 (1976) (holding union responsible for picket-line misconduct where picket captains engaged in misconduct and ignored that of picketers, the union did not fine any picketer, cut off his strike benefits, or remove him from the picket line, and the union made bond and provided legal defense for picketers), enf'd mem., 571 F.2d 587 (7th Cir. 1978).

2. There is also no merit to petitioner's contention (Pet. 5-7, 8) that the court of appeals' decision is in conflict with decisions of this Court holding that a union may not be held responsible for members' misconduct merely because the union fails to disavow it. Petitioner's failure to disavow the misconduct of its members and affiliates, "even after guilt was clear and admitted," Pet. App. A20, was only one of the many factors that the court of appeals found relevant to its finding of ratification and condonation. See pp. 7-8, *supra*.

Moreover, petitioner's conduct here, as assessed by the court of appeals, is distinguishable from that of the unions involved in the decisions on which petitioner relies. In *United Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344, 393 (1922), the Court considered whether the international union could be held responsible for the destruction of coal mining property arising out of a strike called by a district union. Answering that question in the negative, the Court found that there was "nothing to show that the International Board ever authorized [the strike], took any part in preparation for it or in its maintenance * * * or rati[fied] it by paying any of the expenses." *Ibid.* The Court did observe that, "after Stewart, the president of [the district union], had been convicted of conspiracy to defeat the injunction issued to protect the [mines] * * * and had gone to the

penitentiary and was pardoned, White, the national president, wrote a letter thanking the President for this, and * * * subsequently * * * appointed Stewart to a position on a District committee." *Id.* at 394. The Court concluded, however, that "[i]t would be going very far to consider such acts of [White] alone a ratification by the International Board creating liability for a past tort." *Ibid.*

In *Carbon Fuel Co.* v. *United Mine Workers*, *supra*, the Court held that the international union and a district union could not be held responsible for wildcat strikes called by local unions, where there was no evidence that "either the District or International Union instigated, supported, ratified, or encouraged any of the work stoppages" (444 U.S. at 218), and where the international union repeatedly expressed its opposition to wildcat strikes (*ibid.*). And, in *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966), the Court concluded that the evidence of record did not meet the "special proof requirements" made applicable by federal law to state-law tort claims against unions. *Id.* at 735.[5] Specifically, the Court found that "the requisite showing was not made as to possible union authorization of or partic-

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[5] The federal statute involved in *Gibbs* was Section 6 of the Norris-LaGuardia Act, 29 U.S.C. 106, which provides that no union "shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof." Because the Norris-LaGuardia Act, where it applies, establishes a "more restrictive test of union responsibility" than the common-law test of agency that governs unfair labor practice proceedings under the National Labor Relations Act, see *Carbon Fuel Co.*, 444 U.S. at 217 n.6, the relevance of *Gibbs* to the instant case is particularly attenuated.

ipation in the violence" (*id.* at 738), and that "the record fail[ed] to rebut [the union's] contention that it had been unwilling to see its ends accomplished through violence, and indeed had sought to control the excesses which had occurred" (*id.* at 742). In sum, unlike the case at bar, none of those decisions involved an evidentiary record from which it could properly be inferred that the union had ratified or condoned its members' unlawful conduct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FREDERICK L. FEINSTEIN
General Counsel

LINDA SHER
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board

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